SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 439.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AND AGENT UNDER SECTION 206 OF TRANSPORTATION ACT OF 1920, PETITIONER,

vs.

MRS. MAUDE E. GREEN, ADMINISTRATRIX OF THE ESTATE OF JESSE GREEN, DECEASED.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the Circuit Court of Forrest County	1	1
Declaration	1	1
Summons	15	10
General issue plea	16	10
Petition to produce evidence	16	10
Order to produce evidence, etc	20	13
Motion by defendant to require plaintiff to file bill of particulars, etc	22	13
Defendant's first special plea in bar	25	15
Defendant's second special plea in bar	26	16
Plaintiff's petition to make defendant's first special plea more specific	28	17
Plaintiff's reply to petition and affidavit	31	19
Organization Circuit Court, Forrest County, April term, 1920	34	21
Declaration	34	21
Petition of Mrs. Maude E. Green to be appointed administratrix of estate of Jesse Green, deceased	37	23
Letters of administration to Maude E. Green	38	23
Summons	39	24
General issue plea of defendant	40	24
Defendant's first special plea in bar	40	25
Defendant's second special plea in bar	41	25
Plaintiff's reply to first and second plea	44	27
Plaintiff's replication to first special plea	45	27
Plaintiff's replication to second special plea	48	29
Plaintiff's demurrer to defendant's first special plea	51	31
Plaintiff's demurrer to defendant's second special plea	52	32
Plaintiff's demurrer to first special plea of defendant	53	33

	Original.	Print.
Plaintiff's demurrer to second special plea of defendant	54	33
Plaintiff's motion to combine suits	54	33
Order of circuit court on motions	57	35
Motion to require plaintiff to furnish bill of particulars	58	36
Plaintiff's motion to amend declaration	58	36
Instructions for plaintiff—given	60	37
Instructions for plaintiff—refused	65	40
Instructions for defendant—given	67	41
Instructions for defendant—refused	70	43
Judgment	71	44
Motion for new trial	72	44
Order overruling motion for new trial	76	46
Request for 60 days in which to prepare appeal to Supreme Court of Mississippi, and order thereon	77	47
Notice to stenographer	77	47
Notice of appeal	78	47
Certificate of stenographer	79	48
Testimony of Mrs. Maude E. Green	79	49
John Goin	82	51
Hood Knight	89	56
F. M. Sullivan	96	60
J. H. Chancy	101	63
G. C. Godwin	104	66
Red Morgan	109	68
B. O. Doherty	109	69
M. Jacobs	111	70
De Witt	112	71
Motion by defendant for peremotory instruction	114	72
Request of plaintiff to be allowed to reopen case	115	73
Further testimony of defendant:		
Testimony of Mr. De Witt, recalled	115	73
G. C. Godwin, recalled	123	78
John Goin, recalled	129	82
Hubert Hollifield	137	87
E. F. Herring	143	91
G. C. Godwin, recalled	151	96
Plaintiff rested	154	98
Defendant's motion to exclude testimony and for peremptory instruction	154	98
Testimony of G. W. Dawson	154	99
H. E. McGregor	174	111
W. E. Leonard	186	119
Mr. Duvall	187	120
W. L. Oakley	198	127
Expectancy table	201	129
Stenographer's certificate	201	129
Circuit clerk's certificate and cost bill	202	129
Certificate of Supreme Court clerk as to filing record	203	130
Assignment of errors in Supreme Court of Mississippi	203	130
Organization of Supreme Court, Mississippi, March term, 1921	205	132
Order of submission of cause	205	132
Judgment of Supreme Court of Mississippi and opinion	206	133
Order allowing 15 days additional time to file suggestion of error	217	139
Suggestion of error in Supreme Court of Mississippi	217	140
Order overruling suggestion of error	223	143
Clerk's certificate	224	143
Writ of certiorari and return		145

a *Minutes of Supreme Court of Mississippi. October Term, 1920.*

Pleas and proceedings had and done at a regular term of the Supreme Court of the State of Mississippi begun and held at the court room at the capitol in the city of Jackson, Mississippi, on the second Monday, being the eleventh day of October, 1920. Sitting en banc:

Present: The Honorable Sydney Smith, chief justice; the Honorable Sam C. Cook, the Honorable J. B. Holden, the Honorable Eugene O. Sykes, the Honorable George H. Ethridge, and the Honorable William Henry Cook, associate justices; W. J. Buck, clerk, in person, and by W. J. Brown, D. C., and C. L. Johnson, marshal.

1 *Minutes, Forrest County Circuit Court, April term, 1920.*

Be it remembered, that there was begun and held a regular term of the Circuit Court in and for said county, in the city of Hattiesburg, Mississippi, on the 28th day of April, 1920, the same being the 4th Monday thereof, at the courthouse in said county, that being the time and place designated by law for the holding of said court; present and presiding, the Hon. Robert S. Hall, judge of the 12th judicial district of said State; T. Webber Wilson, district attorney; Forrest M. Morris, county attorney; W. M. Edmonson, sheriff of said county; Jennie F. Smith, court stenographer; and J. S. Garraway, clerk of the Circuit Court.

Declaration.

MRS. MAUDE E. GREEN ET AL.
vs.
THE DIRECTOR GENERAL OF RAILROADS FOR THE UNITED STATES Government in possession, use, control, and operation of the railroad of the Gulf & Ship Island Railroad Company.

The plaintiffs, Mrs. Maude E. Green, adult, and Adolphus Green, a minor 11 years of age, and Hamilton Green, a minor 10 years of age, and Jessie Louise Green, a minor 7 years of age, and Mary Green, a minor 4 years of age, by the said Mrs. Maude E. Green, adult and mother, as next friend, complain of Walker D. Hines, Director General of Railroads for the United States Government in possession, use, control, and operation of the railroad of the Gulf and Ship Island Railroad Company, and for cause of complaint allege the facts following, to-wit:

2 That the Gulf and Ship Island Railroad Company is a corporation chartered, organized, and existing under the laws of the State of Mississippi, and owns a line of road which runs through the city of Hattiesburg, in the county of Forrest, State of Mississippi, which said railroad is used in the business of transporting persons and freight for hire and profit and is a common carrier of commerce both intra and inter state.

That said road so existed and was so used and engaged on the first day of January, A. D. 1918, on which last-mentioned date, under an act of the Congress of the United States and the proclamation of the President of the United States, the said railroad was taken over for use and operation of the United States Government, and one William G. McAdoo was, under said act, appointed Director General of Railroads for the United States Government and under said act of Congress, proclamation, and appointment went into, took, and assumed the possession, use, control, and operation of the said railroad of the said Gulf and Ship Island Railroad Company. That thereafter the said William G. McAdoo resigned said position and Walker D. Hines, who is now the active and acting Director General of Railroads, was duly appointed under said act and proclamation to succeed the said William G. McAdoo, accepted said position, and assumed the possession, use, control, and operation of the said railroad and had the possession, use, control, and operation of the same on the 5th day of August, 1918, the date of the injuries herein complained of.

The plaintiffs allege that on the said date of August 5, 1918, and on all other dates herein mentioned, the defendant maintained a yard, yard tracks, switch tracks, spur tracks, and other tracks in the city of Hattiesburg, in which it had engines, cars, and trains and

3 on and over which it operated cars and trains.

The plaintiffs allege that on the said date and dates herein mentioned the said defendant hired, had, and kept in its employment, to operate said railroad, many employees, some of them hired as yardmasters, others as conductors on trains, other as engineer men on trains, others as firemen on trains, and others as switchmen, etc., which said employees the defendant placed in direct control and operation of the engines, cars, and trains, and delegated authority to the conductors to order and direct the movement of the trains and the labor of the other employees thereon. That the defendant as aforesaid delegated to the conductors the authority to control and direct the movement and operation of trains whereon they were placed and to order, command, and direct the labors of the engineers, firemen, switchmen, etc., on such trains; and the plaintiffs allege that it was the duty of the engineers, foremen, and switchmen on trains to obey the orders, commands, and directions of the conductors of trains whereon they worked.

The plaintiffs allege that the defendant having so classified its employees and their labors, and having delegated to the conductors on trains the authority to control the same and to direct the movement thereof, and also the authority to order, command, and direct the labors of the engineers, firemen, switchmen, and all other subordinate employees working on such trains; and having made it the duty of the engineer men, firemen, switchmen, etc., to obey the orders, commands, and directions of the conductors, it was then and there the duty of the defendant to promulgate reasonably necessary and sufficient rules for the conduct of its business, the operation of its trains, and the safety of its employees, such rules as were reason-

ably necessary to the safety and efficiency of the operation
4 of said railroad and the safety and protection of the employees against the hazards of railroading and of being thrown together and working together; and the plaintiffs allege that it was the duty of the defendant, having hired a great number of employees and put them to work together in its yard and on its trains and having classified them and their labors and duties as aforesaid, and having delegated to some, as aforesaid, the power to order, command, control, and direct the labors of others, and having made it the duty of others to obey, it was the duty of the defendant in selecting employees to avoid hiring and not to hire any person to work for it whom it knew to be unruly, stubborn, and of quick, high, and ungovernable temper, or who, by the exercise of the care and caution required of it in selecting and hiring its employees, it could and ought to have known to be of such character, nature, and temper; or who was known by it to be bloodthirsty and dangerous, prone to fight and quarrel, or of which the exercise of the care and caution required of it in selecting and hiring its employees it could and ought to have known, and to keep a reasonable watch and supervision over its said employees to learn of their disposition and habits, to exercise reasonable care and caution to detect and discover the characters, dispositions, and tempers of its said employees, and to discover those of quick, high, and ungovernable tempers and dangerous characters and promptly to discharge any and all such employees from its service; and to avoid hiring and not to hire any person to work for it who made and whom it knew, or by the exercise of the care and caution required of it by law, to wit, pistols concealed while at work and on duty, and to discharge promptly from its service and employment any employee who was and whom it knew to be of quick, high, and ungovernable temper, or dangerous character, quarrelsome disposition, and who carried concealed
5 weapons; and the plaintiffs allege that the faithful performance and discharge of this duty by the defendant was reasonably necessary to the reasonable safety and efficiency of the defendant's business and to the reasonable safety of the employees of the defendant.

But the plaintiffs allege that the defendant carelessly and negligently failed and neglected to perform its aforesaid duty in this:

Said defendant carelessly and negligently failed and neglected to promulgate any rule at all or any sufficient rule for the reasonably safe conduct of its business and the reasonable protection of its employees from the dangers and hazards of being put and required to work with quarrelsome, quick, high, and ungovernable-tempered fellow employees, men of dangerous and desperate habits and character and with deadly weapons, to wit, pistols, while at work. And the defendant carelessly and negligently hired and kept in its employment as engineer on one of its trains, one Zack McLendon, a man of dangerous and desperate character and quarrelsome disposition, who made a habit of going around with a pistol concealed

while at work, with knowledge thereof, or of which, by the exercise of the care and caution required of it, it could and ought to have known, and where general reputation for violence was known generally in the community, and required its other employees to work with the said McLendon after obtaining notice and knowledge of his said dangerous, desperate, and bloodthirsty disposition, inclination, and character. And thereby unlawfully and unnecessarily endangered the lives and limbs of its other employees, whom it required to work with the said Zack McLendon.

The plaintiffs allege that on or about the 5th day of August, 1918, Jesse Green, deceased, who was the husband of Mrs.
6 Maude E. Green, one of the defendants herein, and the father of Alphus Green, a minor 11 years of age; Hamilton Green, a minor 10 years of age; Jessie Louise Green, a minor 7 years of age; and Mary Green, a minor 4 years of age, who sue by their said mother, Mrs. Maude E. Green, adult, as next friend, was working in the employment of the defendant as conductor on one of its trains, with the powers aforesaid delegated to him by the defendant, and the said Zack McLendon was on the same date working for the defendant as engineer on the same train, and the plaintiffs allege that the defendant required the said Jesse Green, deceased, to work on said train with the said Zack McLendon with full notice and knowledge of the bloodthirsty, dangerous, and desperate character of the said McLendon, and knowing or charged with the duty of knowing that the said McLendon was armed with said deadly weapon, to wit, a pistol.

The plaintiffs allege that in the course of the operation of said train and while the said deceased Green was conducting the same, and the said McLendon working as engineer, it became necessary to move the said train and engine in such manner as to switch certain cars therein from one to another of the said tracks in said yard, and the said McLendon because of his quarrelsome and disagreeable disposition, his quick, high, and ungovernable temper, his bloodthirsty, dangerous, and desperate character, all of which was, as aforesaid, well known to the defendant long before and at the time it put the said deceased Green to work with the said McLendon on the same train, and without any provocation from the said Green, deceased, and without legal excuse or justification suddenly
7 became seized of a flame of ungovernable temper, lost control of himself because of the order given by the said Green, deceased, acting within the scope of his employment, in direct line therewith, and in furtherance of the business of the defendant, the common master, which order was proper and necessary, and the said McLendon, while seized and possessed of said fit of passion, and being armed with said deadly weapon, to wit, a pistol, drew said pistol and shot and killed the said Jesse Green, deceased.

The plaintiffs allege that the said Jesse Green was at the time of his death a young man of about 38 years of age possessed of a strong, vigorous body and mind, capable of doing and enduring much hard

labor to which he had been assigned by the defendant and earned a support for himself and family; and the plaintiffs allege that at the time of his death he was receiving from said defendant for his said labors the sum of $4 or $5 per day; they allege that he had for a number of years devoted his time, efforts, and labor to railroad work, and that he was capable of obtaining promotion and would have obtained promotion in service and salary but for his untimely death; they allege that he had a long and valuable expectancy at the time of his death through which to live; they allege that the plaintiffs, Mrs. Maude E. Green, his widow, was at the time of his death a young woman of age of about 32 years, possessed of a strong and vigorous body and mind, in perfect health, and had and still has a long expectancy through which to live and enjoy the companionship, association, protection, and support of the said Jesse Green, deceased, but of all of which she has been deprived by the death of the said deceased; the plaintiffs allege that each of the said children, namely, Alfus Green of the age of 11 years, and Hamilton Green, of the age of 10 years, and Jessie Louise Green, of the age of 7 years, and Mary Green, of the age of 4 years, are still living and are
8 possessed of strong, vigorous minds and bodies, each having long expectancies through which to live, and that each of said children, plaintiffs herein, were entitled to the support, maintenance, counsel, advice, protection, and training which they could and would have received from the said Jesse Green, deceased, but for his death; but the plaintiffs allege that said children and each one of them has been deprived of all of the aforesaid comforts and benefits; the plaintiffs allege that the said Jesse Green, deceased, came to his death in the manner herein alleged as the proximate and direct result of the negligence of the defendant herein alleged; and the plaintiffs allege that because of the death of the said Jesse Green, deceased, the plaintiffs have sustained damage in the sum of $50,000; and they allege that a cause of action has accrued to them to have and recover of and from the defendant the said sum of $50,000, together with all cost of court, for which they sue and demand judgment.

MRS. MAUDE E. GREEN, ET AL.,
Plaintiffs.

In the Circuit Court of Forrest County.

MRS. MAUDE E. GREENE, ET AL.,
vs.
WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS FOR THE UNITED STATES GOVERNMENT.

The plaintiff, Mrs. Maude E. Green, adult, and Alfus Green, age 11; Hamilton Green, age 10; Jessie Louise Green, age 7; and Mary Green, age 4, all minors and children of the said Mrs. Maude E. Green, and who sue by the said Mrs. Maude E. Green as next friend, complain of the defendant, Walker D. Hines, Director General of

Railroads for the United States Government, in possession, use, and control and operation owned by the Gulf and Ship Island Railroad Company, a corporation chartered, organized, and existing
9 under the laws of the State of Mississippi and engaged in the transportation of persons and freight for hire as common carrier, and for cause of complaint allege the following facts, to wit:

On or about the 5th day of August, 1918, the defendant was engaged in the operation as common carrier for hire and profit of the railroad owned by the Gulf and Ship Island Railroad Company, a corporation, the main line of which ran through the city of Hattiesburg, in Forrest County, Mississippi, and in the said city of Hattiesburg the defendant had what is called a yard, switch tracks, spur tracks, etc., and on said date had in its employment to work in said yard and on its engines, cars, and trains many employees, one of whom was Jesse Green, now deceased, who, on the said 5th day of August, 1918, while working for the defendant as conductor on one of its said trains in said yard in said city, county, and State was killed.

The plaintiffs allege that the said Jesse Green, deceased, was required by the defendant to work with, and that it was necessary for the said deceased, in order to perform his labors, to work around with other persons employed by the defendant.

The plaintiffs allege that it was the duty of the defendant to use reasonable care and caution in selecting and hiring its employees and the employees who were put to work with the said deceased, and not to hire any person of high and ungovernable temper and of dangerous character, prone to quarrel and fight, and to keep a reasonable watch and supervision over its said employees in order to discover and to discover those of such tempers, characters, and dispositions and promptly to discharge all such employees from its service.

10 But the plaintiffs allege that the defendant carelessly and negligently failed and neglected to perform this duty in this:

Said defendant prior to and on or about the 5th day of August, 1918, had and kept in its employment one Zack McLendon, who was known generally in the community to be a man of high and ungovernable temper, a dangerous and desperate character, of all which the defendant had knowledge or of all of which it could and ought to have known by the exercise of the care and caution required of it; and the plaintiffs allege that on the said day of August, 1918, the defendant having carelessly and negligently hired and kept in its said employment the said Zack McLendon, with knowledge, as aforesaid, of his dangerous disposition, nature, and character, wrongfully, carelessly, and negligently required the said Jesse Green, deceased, to work with the said dangerous McLendon, on one of its trains, the said Jesse Green, deceased, as conductor and the said Zack McLendon as engineer, this bringing them necessarily into close communication with each other and rendering the place where the defendant put and required the said Jesse Green, deceased, to

work, highly dangerous, all of which the defendant knew or all of which by the exercise of the care and caution required of it, it could and ought to have known, as a proximate and direct result of which when in the course of the operation of said train it became necessary to switch certain cars therein from one to another of the tracks in said yard, and the said Jesse Green, deceased, acting within the scope of his employment, in direct line therewith, and in furtherance of the business of the common master, gave the necessary order signal to said engineer, the said Zack McLendon without any provocation from the said Green, deceased, and without legal excuse or justification, because of his high and ungovernable temper,
11 his dangerous and desperate character, all of which the defendant had knowledge as aforesaid, flew into a rage of ungovernable temper and being then and there armed with a concealed deadly weapon, to-wit, a pistol, drew the said pistol and shot and killed the said Green, deceased.

The plaintiffs allege that the said Jesse Green was at the time of his death a young man of about 38 years of age, possessed of a strong, vigorous body and mind, capable of doing and enduring much hard labor to which he had been assigned by the defendant and earned a support for himself and family; and the plaintiffs allege that at the time of his death he was receiving from the defendant for his said labors the sum of $4.00 or $5.00 per day; they allege that he had for a long number of years devoted his time, efforts, and labor to railroad work and that he was capable of obtaining promotion and would have obtained promotion in service and salary but for his untimely death; they allege that he had a long and valuable expectancy at the time of his death through which to live; they allege that the plaintiff, Mrs. Maude E. Green, his widow, was at the time of his death a young woman of age of about 32 years, possessed of a strong and vigorous body and mind, in perfect health, and had and still has a long expectancy through which to live and enjoy the companionship, association, protection, and support of the said Jesse Green, deceased, but of all of which she has been deprived by the death of the said deceased; the plaintiffs allege that each of the said children, namely, Alfus Green, of the age of 11 years, and Hamilton Green, of the age of 10 years, and Jessie Louise Green, of the age of 7 years, and Mary Green, of the age of 4 years, are still living and are pos-
12 sessed of strong, vigorous minds and bodies, each having long expectancies through which to live, and that each of said children, plaintiffs herein, were entitled to the support, maintenance, counsel, advice, protection, and training which they could and would have received from the said Jesse Green, deceased, but for his death. But the plaintiffs allege that said children and each one of them has been deprived of all of the aforesaid comforts and benefits; the plaintiffs allege that the said Jesse Green, deceased, came to his death in the manner herein alleged as the proximate and direct results of the negligence of the defendant herein alleged; and the plaintiffs allege that because of the death of the said Jesse Green, de-

ceased, the plaintiffs have sustained damage in the sum of $50,000.00; and they allege that a cause of action has accrued to them to have and recover of and from the defendant the said sum of $50,000.00, together with all cost of court for which they sue and demand judgment.

Mrs. MAUDE E. GREEN ET AL.,
Plaintiffs.

For a third cause of action said plaintiffs, Mrs. Louise E. Green, widow, and Alfus Green and Hamilton Green and Jessie Louise Green and Mary Green, children of Jesse Green, deceased, complain of defendant, Walker D. Hines, Director General of Railroads for the United States Government in possession, use, control, and operation of the railroad of the Gulf and Ship Island Railroad Company, a corporation chartered, organized, and existing under the laws of the State of Mississippi, owning a line of road which runs through the city of Hattiesburg, Forrest County, Mississippi, and engaged in
13 the transportation of persons and freight for hire as common carrier. And for cause of complaint allege that on or about the said 5 day of August, 1918, the said defendant was so engaged in operating said railroad and employed a great number of men to work, one of whom was the said Jesse Green, deceased, who was on said date working as conductor on one of the trains of the defendant, and the plaintiffs allege that it was the duty of the defendant to exercise reasonable care and caution in hiring men to work with the deceased and not to hire any man to work with him who was of a dangerous and desperate character and who had ill feeling toward the said deceased; but the plaintiffs allege that the defendant violated and breached this duty in this: The said defendant carelessly and negligently and knowingly hired and put to work with said deceased, Green, one Zack McLendon, as engineer, on the same train upon which it had placed the said deceased as conductor, knowing at the time that the said McLendon was a man of dangerous and desperate character and that he had malice and ill will against the said deceased Green, or all of which by the exercise of the care and caution required of it it could and ought to have known, as a proximate and direct result of which on the said 5 day of August, 1918, while the said Jesse Green, deceased, and the said Zack McLendon were working on the same train the said deceased, as conductor, and the said McLendon, as engineer, it became necessary that certain of the cars in said train be switched from one to another track in the yard of said defendant in the said city of Hattiesburg, and the said deceased, acting within the scope of his employment, in direct line therewith and in furtherance of the business of the common master, the said engineer, whose duty it was to execute the said necessary order, because of his dangerous and desperate character and his ill will toward the said deceased, of all which the defendant as aforesaid had knowledge, drew a pistol with which he was then and there armed and shot and killed the deceased,

14 without any provocation from the deceased, and without legal excuse or justification, and the plaintiffs allege that it was gross negligence of the defendant to keep in its employment the said McLendon and to put him and the deceased to work upon the same train.

The plaintiffs allege that the said Jesse Green was at the time of his death a young man of about 38 years of age possessed of a strong, vigorous body and mind, capable of doing and enduring much hard labor to which he had been assigned by the defendant and earned a support for himself and family, and the plaintiffs allege that at the time of his death he was receiving from said defendant for his said labors the sum of $4.00 or $5.00 per day; they allege that he had for a long number of years devoted his time, efforts, and labor to railroad work and that he was capable of obtaining promotion and would have obtained promotion in servitude and salary but for his untimely death; they allege that he had a long and valuable expectancy at the time of his death through which to live; they allege that the plaintiff, Mrs. Maude E. Green, his widow, was at the time of his death a young woman of age of about 32 years, possessed of a strong and vigorous body and mind, in perfect health, and had and still has a long expectancy through which to live and enjoy the companionship, association, protection, and support of the said Jesse Green, deceased, but of all of which she has been deprived by the death of the said deceased; the plaintiffs allege that each of the said children, namely, Alfus Hamilton, of the age of 11 years, and Hamilton Green, of the age of 10 years, and Jessie Louise Green, of the age of 7 years, and Mary Green, of the age of 4 years, are still living and are possessed of strong, vigorous minds and bodies, each having long expectancies through which to live, and that each of said children, plaintiffs here, were entitled to the support, maintenance, counsel, advice, protection, and training which they could
15 and would have received from the said Jesse Green, deceased, but for his death; but the plaintiffs allege that said children and each of them has been deprived of all of the aforesaid comforts and benefits; the plaintiffs allege that the said Jesse Green, deceased, came to his death in the manner herein alleged as the proximate and direct result of the negligence of the defendant herein alleged; and the plaintiffs allege that because of the death of the said Jesse Green, deceased, the plaintiffs have sustained damage in the sum of $50,000.00, and they allege that a cause of action has accrued to them to have and recover of and from the defendant the said sum of $50,000.00, together with all cost of court, for which they sue and demand judgment.

MRS. MAUDE E. GREEN ET AL.,
Plaintiffs.

Summons.

THE STATE OF MISSISSIPPI:
To the Sheriff of Forrest County:

You are hereby commanded to summon Gulf and Ship Island Railroad Company, a corporation, and W. D. Hines, Director General of Railroads, if to be found in your county, to appear before the Circuit Court of the county of Forrest, in the State of Mississippi, at a term of said court to be held on the 3 day of Nov., A. D. 1919, at the courthouse in the city of Hattiesburg, Mississippi, then and there to answer the declaration of Mrs. Maude E. Green, adult, and Alfus Green, Hamilton Green, Jessie Louise Green, and Mary Green, minors, to which it is defendant, and have there and then this writ.

Given under my hand and seal of said court, and issued this the 3 day of October, 1919.

T. J. MIXON, *Circuit Clerk.*

16 (Endorsed on back:) I have this day executed the within writ personally by delivering to the within named, J. W. Biggs, agt., a true copy of this writ, this 4 day of Oct., 1919. A. E. Harbison, sheriff, by W. B. Risher, D. S.

(Further endorsed on back:) Summons. Issued Oct. 3, 1919. Returnable 1st Monday of Nov., 1919. Returned and filed this the 17 day of Oct., A. D. 1919. T. J. Mixon, clerk of the circuit court.

General issue plea.

Now comes the defendant by his attorneys, and for a plea to the declaration and each count thereof exhibited against him herein says that he is not guilty of the wrongs and injuries complained of in manner and form as said plaintiff hath alleged, and of this said defendant puts himself upon the country.

WELLS, MAYS & SANDERS,
Attorneys for Defendant.

(Endorsed:) Filed this the 20th day of October, 1919. T. J. Mixon, clerk.

Petition.

Your petitioners, Mrs. Maude E. Green et al., respectfully petition the court and allege the facts following, to wit:

Your petitioners are the plaintiffs in the above-styled suit now pending for trial in the Circuit Court of Forest County, Mississippi, before your honor as judge and the jury to be selected in the manner required by law.

17 That said defendant has been summoned to appear and defend said suit for the time and in the manner required by law, and in the trial of said suit one material fact at issue will be what the general reputation of one Zack McLendon named in said declaration was with reference to insubordination, violence, and incontrollable

temper, and another issue material will be what knowledge or notice, if any, the defendant had with reference to the insubordination, violence, and incontrollable temper of the said Zack McLendon before at the time and after it employed the said Zack McLendon to work for it.

Your petitioners allege that said defendant is in possession of books, papers, and documents, or has under its control books, papers, and documents, containing evidence relating to the merits of this act and especially to the two material issues herein set out, which said books, papers, and documents are material and necessary to the plaintiffs in the prosecution of their said suit against said defendant; that is, that the said books, papers, and documents in possession of or under the control of the defendant contain evidence which is material to the establishment of the cause of action of plaintiffs against the defendant; which said books, papers, and documents your petitioners allege are in the exclusive possession of, or under the exclusive control of, the defendant so that your petitioners are unable, without the aid and assistance of this court and the authority of the order of the court, to obtain an inspection and copies of the said books, papers, and documents aforementioned.

Your petitioners allege that said defendant has in its possession or under its control books, papers, and documents which contain the names of all persons or employees who worked for said defendant at the same time the said Zack McLendon named in said declaration worked for it, but whose names your petitioners do not know,
18 which said persons or employees your petitioners are advised and believe know and have knowledge of the general reputation of the said Zack McLendon, his insubordination, violence, and ungovernable temper, and also of what knowledge and notice the said defendant was possessed with reference thereto before, at the time, and after it hired the said Zack McLendon.

Your petitioners desire and need in the prosecution of their suit an inspection and copy of all such books, papers, and documents in order to obtain the names of such persons and employees.

Your petitioners allege that said defendant also has in its possession or under its control books, papers, and documents containing a record of the general deportment of the said Zack McLendon while working in its employment, which said books, papers, and documents your petitioners allege, upon information and belief, contain material evidence of the insubordination, violence, and ungovernable temper of the said Zack McLendon; and your petitioners allege that they desire and need in the prosecution of their said suit against said defendant, to obtain necessary and material evidence, an inspection and copies of all such books, papers, or documents.

Your petitioners allege that charges were made against the said Zack McLendon for insubordination, violence, and ungovernable temper during the time the said Zack McLendon was working for said defendant, on which said charges the said defendant made investigations and in such investigations took the testimony or state-

ments of certain persons and employees working for said defendant with the said Zack McLendon or at the time said Zack McLen-
19 don was working for it, and made written records of such investigation and investigations, of all the books, papers, documents, testimonies, and statements made in such investigation or investigations the said defendant now has in its possession or under its control, which contain necessary and material evidence for your petitioners in the prosecution of their suit, and of all of which they desire and need an inspection and copies.

Your petitioners allege that said defendant has in its possession or under its control the names of the witnesses or employes and written records of the testimony or statements of the witnesses or employes, and the charge against the said Zack McLendon, who testified in any and all investigations made by said defendant into the character and deportment of the said Zack McLendon while working for the defendant, and your petitioners allege that the said charge and charges and the said testimony or statements of the said witnesses contained evidence material to your petitioners in the prosecution of their said suit, and they desire and need inspection and copies of the said charge and charges and of the said testimony or statements of the said witnesses.

Your petitioners allege that J. E. Burns is the assistant superintendent of the said defendant and has in his possession or under his control all of the aforesaid books, papers, and documents and if ordered by the court so to do can furnish your petitioners with inspections and copies thereof, and as aforesaid your petitioners allege that inspections and copies of the aforementioned books, papers, and documents, and of all other similar books, papers, and documents bearing upon the material issues in said case herein mentioned are necessary to enable your petitioner properly, fully, and completely to present to the court and to prosecute their said suit; and
20 that your petitioners are entitled to an order for a subpœna duces tecum to be served upon the said J. E. Burns, assistant superintendent of said defendant, requiring him and said defendant to furnish your petitioners with inspections and copies of all of the aforesaid books, papers, and documents.

The premises considered, your petitioners pray the court for an order requiring said defendant to allow and furnish your petitioners with inspections and copies of all of the aforementioned books, papers, and documents, and may what is provided in law befall the defendant should it fail, neglect, or refuse to obey said order and to furnish your petitioners with inspections and copies of all of the aforesaid books, papers, and documents; and as in duty bound your petitioners will ever pray.

E. L. DENT,
CURRIE & CURRIE,
Attys. for Plaintiff.

(Endorsed:) Filed Nov. 1st, 1919. T. J. Mixon, clerk.

Order.

This day this cause came on for hearing on the petition of Mrs. Maude E. Green et al., the plaintiff, for an order requiring the defendant to give the plaintiffs inspection and copies of certain books, papers, and documents alleged by the plaintiffs to contain material evidence, and the same was by the court heard and considered; it appearing to the court that the petitioners had shown good cause why they should be allowed to inspect and take copies of the books, papers, and documents mentioned in the petition, and that notice
21 of the application had been served on the defendant, and the plaintiffs and the defendant both having appeared in open court and presented said petition to the court. It is ordered by the court that said defendant be, and hereby is, ordered to give to the plaintiffs an inspection and copies, or permission to take a copy, of the books, papers, and documents in the possession of the defendant or under its control containing evidence relating to the merits of this action, and especially books, papers, and documents which contain the names of all persons or employes who worked for said defendant at the same time the said Zack McLendon, named in said declaration, worked for it; and also all books, papers, and documents containing reports and records of the general deportment of the said Zack McLendon while working in the employment of the defendant; also all books, papers, and documents and charges made against the said Zack McLendon for insubordination, violence, and ungovernable temper of the said Zack McLendon from the time he began working with the defendant until his employment with it ended; also all the statements, testimony, or depositions of any and all employes and witnesses who made satements or gave testimony in any and all hearings on any and all charges made against the said Zack McLendon while working for said defendant; also all charges and all books, papers, and documents in the possession of or under the control of the defendant which contain evidence of the insubordination or ungovernable temper of the said Zack McLendon or the violence or ungovernable temper of the said Zack McLendon, or that said plaintiffs be granted permission by said defendant to take copies of said books, papers, and documents.

And it appearing to the court that said cause was set for trial on Thursday, November sixth, and that the plaintiffs are entitled
22 to such inspection and copies or permission to make the same before the date of the trial of said suit, the said defendant is ordered to give to the plaintiffs such inspections and copies between now and the date of said trial.

Motion.

Now comes said defendant, by their attorneys, and respectfully shows unto the court that the declaration heretofore filed herein is so indefinite and uncertain that the precise nature of the complaint

and the defense is not apparent. And that said declaration is so framed as to prejudice, embarrass, and delay a fair trial of the action.

Defendant further shows that said declaration is in vague and general terms and does not specify the circumstances or the occasion on which the pleader relies, and that for the purpose of presenting defendant's defense at the trial it is necessary that said plaintiffs be more specific and furnish a bill of particulars specifying the place and circumstances relied upon and persons present, in the following particulars, to wit:

That said plaintiffs furnish the name or names and address or addresses of every person referred to in plaintiff's declaration charging that the defendant knew the said Zack McLendon to be unruly, stubborn, and of quick and ungovernable temper; and that said defendant knew that said Zack McLendon was bloodthirsty and dangerous, prone to fight and quarrel, and knew that the said Zack McLendon possessed high and ungovernable temper and dangerous character, and carried deadly weapons, to wit, pistols, concealed;

and that the said McLendon was of quick, high, and ungov-
23 ernable temper of dangerous character, quarrelsome disposition, and carried deadly weapons, and who required the said deceased, Jesse Green, to work with quarrelsome character, high and ungovernable fellow employees, men of dangerous and desperate habits, and armed with deadly weapons, to wit, pistols, while at work, and who hired and kept employed as engineer the said Zack McLendon, a man of dangerous and desperate character, and quarrelsome disposition, who made a habit of going around with a pistol concealed while at work, with the knowledge thereof, and who required the said Jesse Green, deceased, to work on a train with the said Zack McLendon, with full notice and knowledge of the bloodthirsty, dangerous, and desperate character of the said McLendon, as alleged in plaintiff's declaration in the first count thereof, and according to similar allegations appearing in the several counts of plaintiff's declaration.

And that said plaintiffs be required to furnish the name or names and address or addresses of all persons referred to in plaintiff's declaration, charged with the duty of knowing the facts set forth in said plaintiffs declaration in the several counts thereof, of like tenor and effect as the allegations of plaintiff's declaration in the first count hereinbefore quoted.

Said defendant further shows that it is necessary for their adversary to be specific and furnish the bill of particulars above outlined, for the purpose of advising said defendant of the identity of the particular witness or witnesses to be produced to refute said allegations mentioned and referred to and quoted from herein.

Sand defendant further shows that he has in his employ, as director of the Gulf & Ship Island R. R., hundreds of employees, and cannot know of the materiality, relevancy, and importance of

24 the testimony of any particular employee without the information herein sought.

Wherefore, said defendant moves the court to require said plaintiff to make his declaration specific in the particulars hereinabove set out, and to furnish a bill of particulars as herein requested.

WELLS, MAY & SANDERS,
TALLY & MASON,
Attorneys for Defendant.

STATE OF MISSISSIPPI,
Forrest County:

This day personally appeared before the undersigned, authority in and for said county, G. R. Kemp, claim agent of the Gulf & Ship Island R. R., who, being by me first duly sworn, states upon his oath that he is the claim agent acting for and on behalf of the Director General of Railroads operating the Gulf & Ship Island R. R. and that in such capacity he is charged with the duty of preparing this cause for trial upon the facts, and to produce such witnesses as may be required in presenting said defendant's defense to said suit and therefore is the proper person to make this affidavit for and on behalf of said defendant.

Affiant further states that the matters and things set forth in the above and foregoing motion are true as therein stated, according to affiant's best knowledge and belief.

G. W. KEMP, *Claim Agent.*

Sworn to and subscribed before me this 7th day of Nov., 1919.
T. J. MIXON, *Circuit Clerk.*

MAY, WELL & SANDERS,
TALLY & MASON,
Attys. for Deft.

25 *First special plea in bar.*

Now comes said defendant, by their attorneys, and for another and special plea to plaintiff's declaration, and each count thereof, heretofore filed herein, said defendant says:

That said plaintiffs ought not to have or maintain their said action, because that at the time and place of the alleged injury said defendant and said alleged offending employee, Zack McLendon, engineer, and said employee, Jesse Green, deceased, were engaged in the handling of interstate commerce in this, to-wit:

That said defendant was operating a common-carrier railroad, engaged in transporting articles of commerce from foreign States into the State of Mississippi, and from the State of Mississippi into foreign States. And that said employees, McLendon and Green, were likewise so engaged in the conduct of defendant's said common-carrier business, as aforesaid. That at the time and place of the fatal injury sued for, and for a long time prior thereto, the said Jesse Green well knew the habits, disposition, and temperament of

the said Zack McLendon, engineer, and well knew of his mental and personal attitude toward the said Green, and continued voluntarily and at his special instance and request to work with the said Zack McLendon upon the same engine or train, the said Green being the foreman of said engine and having the right to direct and control the services of the said Zack McLendon.

Wherefore, said defendant says that the said Jesse Green assumed all risk of injury at the hands of the said Zack McLendon, engineer, growing out of any personal difficulty between them, or disagreement over the performance of their respective or concurrent duties.

26 All of which matters and things said defendant is ready to verify.

TALLY & MASON,
WELLS, MAY & SANDERS,
Attorneys for defendant.

(Endorsed:) Filed Nov. 7th, 1919. T. J. Mixon, clerk.

Second special plea in bar.

Now comes said defendant, by attorneys, and for another and second special plea in bar of plaintiff's action, as stated in the several counts of plaintiff's declaration, said defendant says:

That said plaintiff ought not to have or maintain their said action because sometime prior to the fatal encounter sued for defendant's said employees, Jesse Green, deceased, engine foreman, and Zack McLendon, engineer, had had personal misunderstandings while working together and were separated by said defendant, being placed on different runs and in charge of different engines and trains.

That sometime thereafter and during the time of a strike of certain of the employees of the Gulf and Ship Island R. R. Co., the said employee Green applied to said company to restore him to his original run or work, which would place him in charge of the engine and train operated by said employee McLendon, as engineer, and would give him, the said Green, supervision over the said McLendon. At the time and place the said Green stated to said company that he and the said McLendon had composed their personal differences and made friends, and assured said company that there was no longer any danger to himself or to McLendon by placing them together on the same run and in charge of the same engine and train.

27 Defendant further says that said employee, Green, gave perfect assurance to said company that a perfectly friendly relationship between said employees, Green and McLendon, then existed, and that they each desired to be restored to their former working conditions; that is to say, that the said Green should be placed in charge of the said engine and train operated by the said McLendon as engineer, thereby restoring the right in the said Green to direct and control the services of the said McLendon. The said Green further insisted upon the change that would place him with McLendon, for the reason and upon the ground that the seniority rules of the

Order of Railway Trainmen, as embodied in their contract with the Gulf and Ship Island R. R. Co., entitles him to this particular run on account of his period of service with said Gulf and Ship Island R. R. Co., and that this position paid a better salary or wage than the run on which he, the said Green, was then employed. That thereupon the said Gulf and Ship Island R. R. Co., acting upon the information which it had received from said employee, and from that date or until the dat' of the fatal encounter between the said McLendon and said Green, neither the said Gulf & Ship Island R. R. Co. nor this defendant ever knew or had any reason to believe that either the said Green was unfriendly toward McLendon or that said McLendon was unfriendly towards the said Green or that there was the slightest danger of a personal disagreement or encounter between them in the performance of their work or otherwise.

Wherefore said defendant says that said plaintiffs are estopped to interpose or maintain any claim against said defendant for retaining in his employ the said Zack McLendon, engineer, whose selec-
28 tion was ratified and approved by the said Jesse Green, deceased, and who was placed with the said Jesse Green, deceased, at the special instance and request of the said Jesse Green.

All of which such matters and things said defendant is ready to verify.

TALLY & MASON,
WELLS, MAY & SANDERS,
Attorneys for defendant.

(Endorsed:) Filed Nov. 7th, 1920. T. J. Mixon, clerk.

Petition to make first special plea more specific.

Comes the plaintiffs and petition the court to require the defendant to make its said first special plea, wherein it attempts to allege that the said Jesse Green and Zack McLendon were engaged in interstate commerce at the time of the killing, more specific so as to show and allege, or to file a special bill of particulars under said plea so as to show or allege the following facts:

1st. The number of the locomotive engine which the said Jesse Green and Zack McLendon were at the time using, and describing particularly the nature and character of the work or service in which said engine was at the time being used.

2nd. The number of cars, and the numbers on the cars, and the names of the cars coupled on to, connected with, or actually attached to said locomotive engine at the time of the killing of the said Jesse Green by the said Zack McLendon, and define particularly the nature and character of the service or use to which each of said cars was being put at the time.

29 3rd. Alleging whether said cars or any of them were at the time loaded, and if loaded, alleging particularly the exact description of each article in each load, on each, in each, any or all of said cars, where the same originated and where destined to.

4th. Alleging whether said cars were empty, and if empty, defining and describing particularly the nature and character of the use to which said cars were at the time being put; when and where said cars and each of them were last used, if at all, in interstate commerce; and when, if at all, said cars or any of them were again to be used, if at all, in interstate commerce.

5th. Alleging particularly the object and purpose or objects and purposes for which said cars were at the time being moved or switched.

6th. Describing and defining particularly the exact work, the nature and character thereof, in which the said Jesse Green and Zack McLendon were engaged at the time the said Zack McLendon shot and killed the said Jesse Green.

And the plaintiffs allege that it is necessary and indispensable to justice in this case that they have all of the information above requested before they shall be required, if at all, to answer or reply to said special plea, if they shall be held to reply thereto, and they allege that all of the aforesaid information is in the exclusive possession of or under the control of the defendant and that the defendant actually has been, or should have, and is required by law to have in his possession or under his control, all of the aforesaid information, and to know all about the same; and the plaintiffs allege that it is necessary and indispensable that the court have before it all of the aforesaid information and facts before it can determine as a matter of law whether said Jesse Green and the said Zack McLendon were at the time of the killing of the said Jesse Green by the said Zack McLendon engaged in interstate commerce, and the plaintiffs allege that said issue is vital and material and that they are entitled as matters of right and law to a full disclosure by the defendant of all of the aforesaid facts requested, and that they cannot in view of the said plea filed by the said defendant proceed further with the proper prosecution of their case without the same.

ED. DENT,
CURRIE & CURRIE,
By N. T. CURRIE,
Attorneys for Plaintiff.

STATE OF MISSISSIPPI,
Forrest County:

Personally appeared before me, T. J. Mixon, clerk of Circuit Court, Forrest County, Mississippi, N. T. Currie, one of the attorneys of record for the plaintiffs in the above-styled case, who being by me first duly sworn, on oath makes affidavit that the allegations of the foregoing petition are true and correct as stated and to the accordance of his best knowledge and belief and that the facts and information requested in paragraphs Nos. 1, 2, 3, 4, 5, and 6 are material to the issue, necessary and indispensable to the plaintiffs in the further proper prosecution of their case, and that the defendant it is in possession of, or ought to be, of all of the facts requested and could, if required by order of the court so to do, amend its said plea so as to set

out the same therein or file a bill of particulars under said plea setting out therein or file a bill of particulars under said plea setting out the same, and that this petition and affidavit are not filed for the purpose of delay but in good faith and to obtain possession of facts within the knowledge of the defendant material and of facts within the knowledge of the defendant, material and indispensable to the plaintiffs in the further, proper prosecution of their case.

31 (Signed) CURRIE & CURRIE,
By N. T. CURRIE.

Sworn to and subscribed before me this — day of November, 1919.
(Endorsed:) Filed 12/2/1919. T. J. Mixon, clerk.

Reply to petition and affidavit.

And now comes the plaintiffs and on reply to the petition and affidavit of the defendant for a bill of particulars to be filed herein, November seventh, 1919, will say:

They deny that the declaration is so indefinite and uncertain that the precise nature of the complaint and the defense is not apparent. And that the declaration is so framed as to prejudice, embarrass, and delay a fair trial of the action.

They deny that said declaration is in vague and general terms and does not specify the circumstances or the occasions on which the plaintiffs rely and that for the purpose of presenting defendant's defense at the trial it is necessary that the plaintiffs be more specific and furnish a bill of particulars specifying the complaints and circumstances relied upon; on the contrary the plaintiffs aver that the allegations of the declaration in each and every count thereof are sufficient, definite, specific, and certain to advise the defendant of the cause of action alleged against it; and the plaintiffs aver further that the allegations of the declaration are as definite, certain, and specific as they were able to make the same in the light of the facts in their possession at the date of the filing of the same.

32 And the plaintiffs deny the right of the defendant under the circumstances to call upon the court to require plaintiffs to file a bill of particulars such as is prayed for in the petition of the defendant, for the reason that on November first, 1919, the plaintiffs filed a petition under section 1003 of the Code of Mississippi, 1906, for an order of court upon the defendant requiring the defendant to give inspections and copies, or to permit inspections and copies to be made, of all books, papers, and documents in the possession or under the control of the defendant containing evidence relating to the general deportment of one Zack McLendon named in the said declaration while both the said Zack McLendon and Jesse Green were engaged at work for the defendant, and the insubordination, violent, and uncontrollable temper of the said Zack McLendon, which is a material issue in said cause, and also the knowledge of the defendant with reference to the character, temperament, and disposition of the said Zack McLendon, before, at the time, and after it employed the

said Zack McLendon to work for it. And the petition of said plaintiffs was heard by the court and an order was granted to plaintiffs thereon by the court requiring the said defendant to give inspections and copies, or to permit the plaintiffs to make inspections and copies, of all such books, papers, and documents in the possession or under the control of the defendant before the trial of said case; and the plaintiffs allege that said petition of the plaintiffs and said order of the court thereon was filed and granted before the date of the filing by the defendant of its petition and affidavit for a bill of particulars, and the said defendant failed and neglected or refused to comply with the order of the coyrt before filing its said petition for a bill of particulars, and has not yet complied with said order of the court, and the plaintiffs allege that it is impossible for them to file a bill of particulars such as is petitioned for by the defendant be-
33 fore the said defendant shall have complied fully with the order of the court requiring it to give inspections and copies, or permit inspections and copies, of the books, papers, and documents referred to and mentioned in the said petition of the plaintiffs, a copy of which said petition and the order of the court thereon granted are hereto attached as Exhibits "A" and "B" and made parts hereof.

The plaintiffs allege that the information sought by the defendant in its petition for a bill of particulars is in large part the same as was said by the plaintiffs in their petition for an inspection and copies of the books, papers, and documents mentioned in the said petition of the plaintiffs; and the plaintiffs allege upon its information and belief, which they believe to be true and correct, that the defendant actually has in its possession or under his control all of the said books, papers, and documents specified, mentioned, and referred to by plaintiff in their said petition, and they therefore deny that the defendant is entitled to any bill of particulars from the plaintiffs undertaking to set out any of the information which the said defendant already has in its exclusive possession or under its exclusive control.

The plaintiffs, therefore, pray the court to deny the defendant an order upon them requiring them to file such a bill of particulars, and to strike the defendant's petition for such a bill of particulars from the files, and to grant the plaintiffs all of the relief provided for in said section 1003, of said code unless the said defendant shall immediately, or within such time as the court may fix, give inspections and copies or permit inspections and copies of all the books, papers, and documents pertinent to the said issue in this cause
34 and especially mentioned or referred to in the said petition of the plaintiffs and the said order of the court thereon granted, and for such other and all other relief as the court may deem meet and proper.

And as in duty bound your plaintiffs will ever pray.

ED. DENT.
CURRIE & CURRIE.

(Endorsed:) Filed 12/2/1919. T. J. Mixon, clerk.

Minutes, Forrest County Circuit Court, April term, 1920.

Be it remembered that there was begun and held a regular term of the Circuit Court in and for said county in the city of Hattiesburg on the 26th day of April, 1920, the same being the 4th Monday in April, 1920, at the courthouse in said county, that being the time and place designated by law for the holding of said court; present and presiding the Hon. Robert S. Hall, judge of the 12th judicial district of said State; T. Weber Wilson, district attorney; Forrest M. Morris, county attorney; W. M. Edmondson, sheriff of said county; Jennie F. Smith, official court stenographer; J. S. Garraway, clerk of the Circuit Court.

Declaration.

The plaintiff, Mrs. Maude E. Green, administratrix of the estate of Jesse Green, deceased, complains of the defendant, The Director General of Railroads in possession, use, control, and operation of the railroad of the Gulf and Ship Island Railroad Co., a corporation, and alleges the facts following, to wit:

That the plaintiff is the widow of Jesse Green, deceased,
35 and by decree of the Chancery Court of Forrest County, Mississippi, a copy of which decree and letters of administration are hereto attached as Exhibit "A" and "B," is administratrix of the estate of the said Jesse Green, deceased, and as such brings this suit for herself and the benefit of Alfus Green, 11 years of age; Hamilton Green, 10 years of age; Jessie Louise Green, 7 years age; and Mary Green, a minor 4 years of age, all children of the said Jesse Green, deceased.

That the Gulf and Ship Island Railroad Company is a corporation chartered, organized, and existing under the laws of the State of Mississippi and owns a line of railroad which extends into and through the city of Hattiesburg, in Forrest County, Mississippi, and engaged as common carrier in the transportation of persons and freight for hire.

Under the act of Congress and the proclamation of the President of the United States, the Government of the United States, on or about the first day of January, A. D. 1918, took over and assumed the possession, control, and operation of said railroad so engaged and continued thereafter to operate the same up to the present time and still so operates the same.

The plaintiff alleges that on or about the 5th day of August, A. D. 1918, said defendant had possession, use, control, and operation of said railroad and on said date was engaged in operating the same, using locomotive engines, cars, and trains which were propelled by the powerful and dangerous agency of steam, running upon tracks, and was on said date engaged in the business of common carrier for hire, transporting persons and freight for hire and profit.

That on the said 5 day of August, A. D. 1919, the said Jesse Green, deceased, was hired by said defendant to work as conductor on one of its said trains, and the said deceased was on said date actively and

actually engaged in work for the defendant as conductor on
36 one of its said trains at the time of the injuries herein complained of, acting within the scope of his employment and in direct line with his duties thereunder, exercising ordinary care and caution for his own safety; that on the same day defendant had working for it in its employment, under a contract of hire, as engineer on the engine of its said train, one Zack McLendon, who at the time of the injuries herein complained of was also engaged at work for the master as engineer operating one of the engines of the defendant; the said Jesse Green, deceased, and the said Zack McLendon, engineer, had been by said defendant on said date placed to work on the same train and were both engaged about the business of the common master, the defendant, at the time of the injuries herein complained of.

The plaintiff alleges that the said Zack McLendon, engineer, while in the discharge of the said duties was known by said defendant to be oppressive and malicious in his conduct toward those with whom he came in contact and to be of high and ungovernable temper, a dangerous man, and that this was well known to the defendant and to the community in general long before the killing of the said deceased, Jesse Green, by the said Zack McLendon.

The plaintiff further alleged that the said defendant retained the said Zack McLendon in its employment, well knowing the facts aforesaid relative to his said conduct, temperament, character, and disposition.

The plaintiff alleges further that the said defendant, through its said agent, servant, and employee, Zack McLendon, and while the said Zack McLendon was about his master's business, wilfully, wantonly, and maliciously, and without provocation or just cause, on the said date of August 5, A. D. 1918, on the train, track, and premises of the said defendant, while in operation, control, and management of the said engine of the said defendant, with a pistol which he had carried concealed, shot and killed the said Jesse Green, so that
37 the plaintiff and said minor children have been deprived by means thereof and as a proximate and direct result thereof of a husband and father, of a husband and father's care, association, protection, support, and advice, and they and each suffered and still suffer great pain, both mentally and physically, as a proximate and direct result thereof.

The plaintiff alleges that a cause of action has accrued to her, as administratrix of the estate of the said deceased, to recover of and from the defendant the damages sustained by her as the widow of said deceased and each of said children, in this one action, and that they have all sustained damage in the sum of $50,000, for which said defendant is liable and for which she sues as administratrix of the estate and demands judgment with all cost of court.

MRS. MAUDE E. GREEN.

E. L. DENT and CURRIE & CURRIE,
Attorneys.

EXHIBIT "A."

Petition of Mrs. Maude E. Green to be appointed administratrix of the estate of Jesse Green, deceased.

This day this cause came on for hearing, and the same was by the court considered, and it appearing that no person had been appointed to administer said estate, that no other person had applied for administration thereof, that the petitioner herein is the widow of the said Jesse Green, deceased, and is entitled to the first right to be appointed to administer said estate, that said petitioner is a suitable person to administer the same, that a bond conditioned according to law has been filed and approved, and said estate being in need of administration and an administrator, it is accordingly ordered, adjudged, and decreed by the court that said petitioner, Mrs. Maude E. Green, the widow of the said Jesse Green, deceased, be and she is hereby appointed administratrix of said estate with
38 all the rights, powers, and privileges pertaining to said office, and that letters of administration be and hereby are issued and delivered to said petitioner.

So ordered, adjudged, and decreed this the 5th day of December, A. D. 1919.

HERBERT GILLIS, *Chancery Clerk.*

STATE OF MISSISSIPPI,
County of Forrest.

I, Herbert Gillis, chancery clerk in and for said county and State, do hereby certify that the above and foregoing is a true and correct copy of a decree this day rendered appointing Mrs. Maude E. Green administratrix of the estate of Jesse Green, deceased, as the same appears on file and of record among the papers in said administration in my office.

Given under my official seal and signature this the 5th day of December, A. D. 1919.

[SEAL.] HERBERT GILLIS, *Chancery Clerk.*

Letters of administration.

THE STATE OF MISSISSIPPI,
Forrest County:

By the Chancery Court of said county.

Whereas Jesse Green, deceased, late of said county, died intestate, as we are informed, having whilst he lived and at the time of his death divers goods and chattels, rights, and credits within this State; and we, desiring that the said goods and chattels, rights, and credits may be well and truly administered, converted, and disposed of, do hereby grant unto Mrs. Maude E. Green full power by the tenor of

these presents to administer the goods and chattels, rights, and credits which to the said deceased in his lifetime, and at the
39 time of his death, did belong; to ask, levy, recover, and receive the same, and pay the debts in which the deceased stood bound, so far as the goods, chattels, rights, credits, lands, tenements, and hereditaments of the said deceased will extend, according to their rate and the order of the law, to make a true and perfect inventory of said goods and chattels, rights, and credits, and the same to exhibit in the office of the clerk of this court, at or before the expiration of three months from the date hereof; and to render a just account of the said administration when thereunto legally required; and the said Mrs. Maude E. Green hereby ordained administratrix of all and singular the goods and chattels, rights, and credits of the said deceased.

Witness the Honorable W. M. Denny, jr., chancellor of the 8th district, this 5th day of December, A. D. 1919, and the seal of said court hereunto affixed.

[SEAL.] HERBERT GILLIS, *Clerk.*

Exhibit "B."

THE STATE OF MISSISSIPPI:

To the Sheriff of Forrest County:

You are hereby commanded to summon Gulf and Ship Island Railroad Company, a corporation, and Walker D. Hines, Director General, if to be found in your county, to appear before the Circuit Court of the county of Forest, in the State of Mississippi, then and term of said court to be held on the 5th day of January, A. D. 1920, at the courthouse in the city of Hattiesburg, Mississippi, then and there to answer the declaration of Mrs. Maude E. Green, administratrix of the estate of Jesse Green, to which they are defendants, and have there and then this writ.

Given under my hand and seal of said court, and issued this the 6th day of December, 1919.

T. J. MIXON, *Circuit Clerk.*

40 (Endorsed on back:) I have this day executed the within writ personally by delivering to the within-named James Hays, chief clerk of the within-named G. & S. I. R. R. C., a true copy of this. This 6 day of December, 1919. A. E. Harbison, sheriff.

(Further endorsed:) Summons. Issued Dec. 6th., 1919. Returnable 1st Mon., Jany., 1920.

General issue plea.

Now comes Walker D. Hines, Director General of Railroads, operating the Gulf and Ship Island Railroad, defendant herein, and for plea to the declaration exhibited by said plaintiff herein says that said defendant is not guilty of the wrongs and injuries complained of in

manner and form as said plaintiff hath alleged, and of this said defendant puts himself upon the country.

TALLY & MASON,
WELLS, MAY & SANDERS,
Attorneys for defendant.

(Endorsed:) Filed 2nd day of January, 1920. T. J. Mixon, clerk.

First special plea in bar.

Now comes said defendant by attorneys, and for another and first special plea in bar to plaintiff's declaration says:

41 That said plaintiff ought not to have or maintain her said motion because at the time and place of the alleged injury said defendant and said defendant's deceased employe were then and there engaged in interstate commerce, in this, to wit:

That said defendant was operating a common-carrier railroad engaged in transporting articles of commerce from foreign States into the State of Mississippi and from the State of Mississippi into foreign States, and that said defendant's said employe, Jesse Green, deceased, was likewise so engaged in the conduct of said common-carrier business as aforesaid, in interstate commerce; that at the time and place of the fatal injury sued for and for a long time prior thereto, the said Jesse Green well knew the habits, disposition, temperament, and character of the said Zack McLendon, engineer, and well knew of the mental and personal attitude of the said Zack McLendon toward the said Jesse Green, and with such knowledge the said Green continued, voluntarily and at his special instance and request, to work with the said Zack McLendon upon the same engine or train, the said Green being the foreman of said engine, and having the right to direct and control the services of the said Zack McLendon.

Wherefore said defendant says that the said Jesse Green assumed all risk of injury at the hands of the said Zack McLendon, engineer, growing out of any personal difference between them or disagreement over the performance of their respective or concurrent duties.

All of which matters and things said defendant is ready to verify.

TALLY & MASON,
WELLS, MAY & SANDERS,
Attorneys for defendant.

Filed 2 day of January, 1920. T. J. Mixon, clerk.

Second plea in bar.

Now comes said defendant by attorneys, and for another and second plea in bar of plaintiff's action says:

42 That said plaintiff ought not to have or maintain her said action because some time prior to the fatal injury sued for,

defendant's said employee, Jesse Green, deceased engine foreman, and Zack McLendon, engineer, had a personal misunderstanding while working together and were separated from each other in their work for said defendant, being placed on different runs; that is, on different engines or trains.

That some time thereafter, and during the time of a strike of certain of the employes of the Gulf and Ship Island Railroad Company, the said employe, Jesse Green, applied to said company to restore him to his said original run or work which would place him in charge of the engine and train operated by said employe McLendon as engineer, and would give him, the said Green, supervision over the said McLendon. At said last-mentioned time and place the said Green stated to said company that he and the said McLendon had composed their personal differences and made friends, and the said Green assured the said company that there was no longer reason to apprehend any danger of harm or injury to himself or the said McLendon by placing them together on the same run and in charge of the same engine and train.

Defendant further says that said employe Green gave perfect assurance to said company that a perfectly friendly relationship between said employe Green and McLendon then existed, and that they each desired to be restored to their former working conditions, that is to say, that the said McLendon as engineer, thereby restoring the right of the said Green to direct and control the services of the said McLendon. The said Green further insisted upon the change that would place him with the said McLendon for the reason and upon the ground as insisted by him, that the seniority rules of the
43 Order of Railway Trainmen embodied in their contract with the said Gulf & Ship Island Railroad Company entitled him, the said Green with the Gulf & Ship Island Railroad Company, and that this position paid a better salary or wage than the run on which he, the said Green, was then employed. That thereupon the Gulf and Ship Island Railroad Company, acting upon the information which they had received from said employe Green, acceded to the request of the said employe, and from that date, or until the date of the fatal encounter between said McLendon and said Green, neither the Gulf & Ship Island Railroad Company, nor this defendant ever knew or had reason to believe that either the said Green was unfriendly toward the said McLendon, or that the said McLendon was unfriendly toward the said Green, or that there was the slightest danger of a personal disagreement or encounter between them in the performance of their work while engaged in the discharge of their respective and concurrent duties to said defendant.

Wherefore said defendant says that said plaintiff is estopped to interpose or maintain any claim against said defendant for retaining in his employ the said Zack McLendon, engineer, whose selection as such was ratified and approved by the said Jessie Green, now de-

ceased, and who was placed with the said Jesse Green at the special instance and request of the said Jesse Green.

All of which matters and things said defendant is ready to verify.

TALLY & MASON,
WELLS, MAY & SANDERS,
Attorneys for defendant.

Filed this the 2nd day of January, 1920. T. J. Mixon, clerk.

44 *Reply to first and second plea.*

The plaintiff further replying to the first and second special pleas herein filed by the defendant denies that the said Jesse Green, deceased, voluntarily worked with the said Zack McLendon, or that he selected and hired, or ratified the act of the defendant in selecting and hiring the said Zack McLendon or retaining him, the said Zack McLendon, in the employment of the defendant and avers on the contrary that the said Jesse Green, deceased, had no right, power, or authority to hire or discharge the said Zack McLendon, and that this matter, duty, and power rested entirely with the defendant.

She denies that said defendant had no knowledge or notice of the continued and generally and commonly known high and uncontrollable temper and dangerous character of the said Zack McLendon after it put the said Jesse Green, deceased, and the said Zack McLendon to work together, and on the contrary avers that the defendant knew all of the time of the high and uncontrollable temper of the said Zack McLendon, and his dangerous character, all of which was generally known in the community, and knew or ought to have known that there was danger, owing to the said disposition and character of the said McLendon, to the said Jesse Green, deceased, and any and all employees whose duties did or might bring them into communication or touch with the said McLendon while engaged in and about the work in which they were engaged, and knew or ought to have known that such a man as the said Zack McLendon was generally known to be was a menace to all of its other employees required to work with, at, around, or near the said Zack McLendon and whose duties required them to have anything to do with him, and the defendant, knowing all this, wrongfully and negligently retained in its employment the said Zack McLendon as a proximate and direct result of which the said Jesse Green, deceased, lost his life in the manner alleged in
45 the declaration, of all of which the plaintiff puts herself upon the country.

ED. DENT.
CURRIE & CURRIE.

Replication to first special plea.

And now comes the plaintiff and for replication to the first special plea in bar herein filed by the defendant says:

She denies that said plaintiff ought not to have or maintained her said action because at the time and place of the said injury said de-

fendant and said defendant's deceased employe were then and there engaged in interstate commerce, in this to wit:

That said defendant was operating a common-carrier railroad engaged in transporting articles of commerce from foreign States into the State of Mississippi and from the State of Mississippi into foreign States, and that said defendant's said employe, Jesse Green, deceased, was likewise engaged in the conduct of said common-carrier business as aforesaid, in interstate commerce as alleged in said plea.

And plaintiff denies that at the time and place of the fatal injury sued for and for a long time prior thereto, the said Jesse Green well knew the habits, disposition, temperament, and character of the said Zack McLendon, engineer, and well knew of the mental and personal attitude of the said Zack McLendon toward the said Jesse Green, as alleged in said plea, and the plaintiff denies that with such knowledge the said Green continued, voluntarily and at his special instance and request, to work with the said Zack McLendon upon the same engine or train, the said Green being the foreman of said engine, and having the right to direct or control the service of the said Zack McLendon, as alleged in said plea.

46 And the plaintiff denies wherefor the said defendant says that the said Jesse Green assumed all risk of injury at the hands of the said Zack McLendon, engineer, growing out of any personal differences between them or disagreement over the performance of their respective or concurrent duties, as alleged in said plea. On the contrary, plaintiff avers, as is alleged in said declaration, that it was the nondelegable duty of the defendant, as well as the sole and exclusive right of the defendant, to select and hire its own employes; and the plaintiff avers, as is alleged in the declaration, that it was the duty of the defendant in selecting its employes to use reasonable care and caution to hire and retain in its employment only employes who were reasonably competent to do the work required of them, and to avoid hiring and not to hire, as is alleged in said declaration, any employe or person, or to retain in its employment any person known to it and generally known in the community, as alleged in said declaration, to be of high and uncontrollable temper and dangerous character; and plaintiff avers, as is alleged in said declaration, that the defendant hired and retained in its employment the said Zack McLendon, who was known to it to be a man of high and uncontrollable temper and of dangerous character and who was known in the community to be of high and uncontrollable temper and dangerous character; and the plaintiff avers, as is alleged in said declaration, that the defendant required the said Jesse Green, deceased, and its other employes whom it was necessary in the course of the discharge of their duties and performance of their labors to come into contact with and to work with him, the said Zack McLendon, to work with, at, and around the said Zack McLendon; and the plaintiff avers, as is alleged in the said declaration, that the said defendant had

47 the right, power, and authority to classify its said work and employes and to command, order, and direct its said work

and its said employes in the performance thereof; and plaintiff avers, as is alleged in the said declaration, that the defendant placed the said Jesse Green, deceased, to work with, at, and around him, the said Zack McLendon, on one of its said engines and trains, as alleged in the said declaration, well knowing before and at the time the dangerous character and reputation of him, the said Zack McLendon, and this being true, the plaintiff denies that he, the said Jesse Green, deceased, voluntarily and at the special instance and request worked with, at, and around him, the said Zack McLendon.

The plaintiff denies that he, the said Jesse Green, deceased, had anything to do with hiring him, the said Zack McLendon; she denies that he, the said Jesse Green, deceased, had anything whatever to do with retaining him, the said Zack McLendon, in the employment of the said defendant; on the contrary, the plaintiff avers that the matter of hiring and retaining by the defendant in its employment the said Zack McLendon was a matter over which the defendant had exclusive authority and control, and the plaintiff therefore denies, as is alleged in said plea, that he, the said Jesse Green, assumed all risk of injury at the hands of the said Zack McLendon, engineer, and avers, as is alleged in the said declaration, that as a proximate and direct result of the act of the said defendant in hiring and retaining in its employment him, the said Zack McLendon, that he, the said Jesse Green, deceased, was at the time and place and in the manner alleged in the declaration, shot and killed by him, the said Zack McLendon, and that the defendant is liable therefor.

And of all which the plaintiff puts herself upon the country.

Attorneys for Plaintiff.

48 (Endorsed:) Filed Jany. 9th, 1921. J. S. Garraway, clerk.

Replication to the second plea.

Now comes the plaintiff and for replication to the second special plea in bar herein filed by the defendant says:

She denies, as is alleged in said plea, that said plaintiff ought not to have or maintain her said action because some time prior to the fatal injury sued for the defendant's said employe, Jesse Green, deceased, engine foreman, and Zack McLendon, engineer, had a personal misunderstanding while working together and were separated from each other in their work for said defendant, being placed on different runs; that is, on different engines or trains, as alleged in said plea.

And the plaintiff denies that some time thereafter and during the time of a strike of certain of the employes of the Gulf and Ship Island Railroad Company, the said employe, Jesse Green, applied to the said company to restore him to his original run or work which would place him on charge of the engine and train operated by the said employe McLendon as engineer, and would give him, the said

Green, supervision over the said McLendon, as alleged in the said plea, and the plaintiff denies that at said last-mentioned time and place the said Green stated to said company that he and said McLendon had composed their personal differences and made friends, as alleged in said plea, and plaintiff denies that the said Green assured the said company that there was no longer reason to apprehend any danger of harm or injury to himself or the said McLendon by placing them together on the same run and in charge of the same engine and train, as alleged in said plea.

49 And the plaintiff denies that said employe Green gave perfect assurance to said company that a perfectly friendly relationship between said employe and McLendon then existed, and that they each desired to be restored to their former working conditions; that is to say, the said Green should be placed in charge of the engine then operated by said McLendon as engineer, thereby restoring the right of said Green to direct and control the services of said McLendon, as is alleged in said plea; and the plaintiff further denies that the said Green further insisted upon the change that would place him with the said McLendon for the reason and upon the grounds, as insisted by him, that the seniority rules of the Order of Railway Trainmen embodied in their contract with the said Gulf & Ship Island Railroad Company entitled him, the said Green, to this particular run on account of his period of service with the Gulf & Ship Island Railroad Company, and that this position paid a better salary or wage than the run in which he, the said Green, was then employed, as is alleged in the said plea.

And the plaintiff denies that thereupon the said Gulf & Ship Island Railroad Company, acting upon the information which they had received from said employe Green, acceded to the request of said employe, and from that date or until the date of the fatal encounter between said McLendon and said Green neither the Gulf & Ship Island Railroad Company nor this defendant ever knew or had reason to believe that either the said Green was unfriendly toward the said McLendon, or that the said McLendon was unfriendly toward the said Green, or that there was the slightest danger of a personal disagreement or encounter between them in the performance of their work while engaged in the discharge of their respective and concurrent duties to said defendant, as alleged in said plea.

50 And the plaintiff denies, as is alleged in said plea, wherefore the said defendant says that said plaintiff is estopped to interpose or maintain any claim against said defendant for retaining in its employ the said Zack McLendon, engineer, whose selection as such was ratified and approved by the said Jesse Green, now deceased, and who was placed with the said Jesse Green at the special instance and request of the said Jesse Green, as is alleged in said plea. And the plaintiff denies that the said Jesse Green, deceased, had anything whatever to do with the hiring of the said McLendon to work for said defendant, and she denies that the said McLendon was hired

by the said defendant and retained in its employment with the ratification and approval of the said Jesse Green, deceased; on the contrary plaintiff avers, as is alleged in the declaration, that it was the sole power, province, and duty of the defendant to hire its own employes and to discharge such as were unfit and incompetent; and the plaintiff avers, as is alleged in the declaration, that this said right and duty is and was one of the nondelegable rights and duties of the said defendant; and the plaintiff avers, as is alleged in said declaration, that the defendant in the exercise of this power hired and retained in its employment the said Zack McLendon at a time at which and before which it knew that the said Zack McLendon was a man of high and uncontrollable temper and dangerous character and at which and before which it was generally known in the community that the said Zack McLendon was a man of high and uncontrollable temper and dangerous character, and the plaintiff avers, as is alleged in said declaration, that said defendant retained in its employment the said Zack McLendon, well knowing, and at a time when it was well known to the community in general, that he, the said Mc-
51 Lendon, was a man of high and uncontrollable temper and dangerous character, and the plaintiff avers, as is alleged in said declaration, as a proximate and direct result of which the said Jesse Green was at the time and place and in the manner set out in the declaration, shot and killed by the said McLendon.

And all of which the plaintiff puts itself upon the country.

Attorneys for plaintiff.

Filed June (?) 9th, 1920. J. S. Garraway, clerk.

Demurrer to first special plea.

Come the plaintiffs and demur to the first special plea herein filed by the defendant wherein it undertakes or attempts to plead that at the time of the killing of the said Jesse Green by the said Zack McLendon that they, the said Jesse Green and Zack McLendon, were engaged in interstate commerce, assigned to the following grounds of demurrer, and pray the judgment of the court whether they shall be required to make further answer thereto.

1st. Said plea does not allege any fact or facts from which the court may determine judicially whether the said persons were or not at the time engaged in interstate commerce.

2nd. Said plea does not attempt to define, state, explain, or allege what particular work the said persons were engaged in at the time of the killing, so as to enable the court to determine as a point of law what the character of the work being done at the time of the killing of the said Jesse Green by the said Zack McLendon was, whether intra or inter state.

52 3rd. Said plea is utterly insufficient in its allegations to show what the character of work being done by the said Jesse Green and Zack McLendon was at the time of the killing.

4th. Said plea is insufficient to constitute a defense to the cause of action alleged in the declaration.

ED DENT,
CURRIE & CURRIE,
By N. T. CURRIE,
Attorneys for Plff.

We, Ed Dent and Currie and Currie, attorneys of record for the plaintiffs, certify that in our opinions the foregoing demurrer is well taken and ought to be sustained and that the same is not filed for the purpose of delay.

ED. DENT,
CURRIE & CURRIE,
By N. T. CURRIE,
Attorneys of Record for Plaintiffs.

Filed 12/2/1919. T. J. Mixon, clerk.

Demurrer to second special plea.

Come the plaintiff and demur to the second special plea herein filed by the defendant, assigned the following grounds of demurrer and pray the judgment of the court whether they shall be required to make further answer thereto:

1st. Said special plea constitutes no defense to the cause of action alleged in the declaration.

2nd. Said plea does not exhibit or contain a copy of the contract therein referred to.

3rd. Because the duty of the master, the defendant, to hire, supervise, and discharge its own employees and to select, furnish, supervise, and direct them in the doing of the work required and
53 necessary and for which they were hired is and was, as a matter of law, one of the nondelegable duties of the master and one which the master, the defendant, could not delegate or surrender by contract or otherwise, so as, as a matter of law, to relieve itself from liability.

ED. DENT,
CURRIE & CURRIE,
By N. T. CURRIE,
Attorneys for Plaintiff.

We, Ed. Dent and Currie & Currie, attorneys of record for plaintiffs, certify that in our opinion the foregoing demurrer is well taken and ought to be sustained and that said demurrer is not for the purpose of delay.

ED. DENT,
CURRIE & CURRIE,
By N. T. CURRIE,
Attorneys for Plaintiff.

Filed 12/2/1919. T. J. Mixon, clerk.

Demurrer to first special plea.

Comes the plaintiff and demurs to the first special plea herein filed by the defendant and assigns the following grounds and prays judgment of the court whether she should be required to make any further answer to said plea.

1. The said plea states no defense to the cause of action alleged in the declaration.

2. The said plea alleges no fact or facts from which it may be judicially determined whether the said defendant and the said Jesse Green, deceased, were at the time of the killing of the said Jesse Green by the said Zack McLendon, engaged in interstate commerce.

ED. DENT,
CURRIE & CURRIE,
Attorneys for Plaintiff.

54 We, Ed. Dent and Currie & Currie, attorneys for the plaintiff, hereby certify that in our opinion the foregoing demurrer is well taken and ought to be sustained.

ED. DENT,
CURRIE & CURRIE,
Attorneys for plaintiff.

Filed Jan. 7th, 1920. J. S. Garraway, clerk.

Demurrer to the second special plea.

And now comes the plaintiff and demurs to the second special plea herein filed by the defendant and assigns the following grounds and prays judgment of the court whether she shall be required to make any further answer to said plea.

The said plea is insufficient to constitute a defense to the cause of action alleged in the declaration.

ED. DENT,
CURRIE & CURRIE,
Attorneys for plaintiff.

We, Ed. Dent and Currie & Currie, attorneys for the plaintiff, hereby certify that in our opinion the foregoing demurrer is well taken and ought to be sustained.

ED. DENT,
CURRIE & CURRIE,
Attorneys for plaintiff.

Filed Jan. 7, 1920. J. S. Garraway, clerk.

Motion to combine suits.

Come the plaintiff, Mrs. Maude E. Green et al., as the heirs of Jesse Green, deceased, vs. The Director General of Railroads for the United States Government, in possession, use, control, and operation of the railroad of the Gulf & Ship Island Railroad Company, and

Mrs. Maude E. Green, administratrix of the estate of Jesse Green, deceased, as plaintiff, vs. The Director General of Railroads for the United States Government, in use, possession, control, and
55 operation of the railroad of the Gulf and Ship Island Railroad Company and moves the court to combine said two suits for the following reasons:

1. The said suit No. 2116, styled Mrs. Maude E. Green et al., etc., is an action based upon the laws of the State of Mississippi for the recovery of the damages sustained on account of the death of the said Jesse Green, deceased, as alleged in the declaration now on file in said case, or upon the statutes of the State of Mississippi and the common law as it still exists in the State of Mississippi, and said suit No. 2155 is one wherein Mrs. Maude E. Green, the widow of the said Jesse Green, deceased, and one of the plaintiffs in said suit No. 2116 sues as administratrix of the estate of the said Jesse Green, deceased, basing the cause of action therein alleged upon either the Federal laws of the United States or the statutes and common law in the State of Mississippi, and it is permissible to join in one and the same declaration causes of action some of which rest in the State law and others of which rest in the Federal law.

2. Because the said declaration in said cause No. 2116 has been by order of the court amended so as to substitute as plaintiff in said suit in lieu of the plaintiffs therein named the same said Mrs. Maude E. Green, administratrix of the estate of Jesse Greene, deceased, and therefore the plaintiffs and defendant are one and the same persons in both of said suits.

3. Because all of the issues in each and all of the counts in each of said declarations may be properly tried and disposed of in one and the same trial, the subject matter of the cause of action contained or complained of in each suit being the same and the parties litigate both plaintiffs and defendant being the same.

4. For the reason that before and at the time of the filing of said suit No. 2116 it was the information and belief of the plain-
56 tiffs and their attorneys that the said defendant, the said Zack McLendon, and the said Jesse Green, deceased, named in said declaration were not engaged in interstate commerce and that the Federal laws had no application to the cause of action or to the subject matter about which said suit is brought; but after the filing of said suit the defendant, The Director General of Railroads for the United States Government in possession, use, control, and operation of the said railroad of the Gulf & Ship Island Railroad Company, filed a plea or pleas in which it is alleged that the cause of action alleged in said declaration is controlled by the Federal laws in that when the said Jesse Green, deceased, was killed as charged in the declaration he, the said defendant, and the said Zack McLendon were engaged in interstate commerce and that for that reason the right of action, if any, of the plaintiffs is controlled by the Federal and not the State laws; and if it be true, as alleged by said defendant in its said plea that the said Jesse Green, deceased, was killed while

engaged in interstate commerce, then under the Federal law the suit could be maintained only by the legal representative of the estate of the said Jesse Green, deceased, and could not be maintained by his heirs as individuals; whereupon the plaintiffs in said suit No. 2116, in order to comply with the Federal law, qualified as administratrix of the estate of the said Jesse Green, deceased, one of the plaintiffs in said suit No. 2116, Mrs. Maude E. Green, the widow of the said Jesse Green, deceased, and by her as administratrix of the estate of the said Jesse Green, deceased, filed said suit No. 2155.

Wherefore it is prayed that said suits be combined and that all of the issues therein presented be tried together and in one and the same trial, in the name of Mrs. Maude E. Green, administratrix of the estate of Jesse Green, deceased, as plaintiff and against the said Director General of Railroads for the United States
57 Government in possession, use, control, and operation of the railroad of the Gulf and Ship Island Railroad Company as defendant.

ED. DENT,
CURRIE & CURRIE,
Attorneys.

Filed Jan. 8th, 1920. J. S. Garraway, clerk.

Order of court on motions.

MRS. MAUDE E. GREEN
v.
GULF & SHIP ISLAND RAILROAD CO. } No. 2116.

This day came on to be heard the motion of the defendant to require plaintiff to make her declaration more specific and the court having heard and considered said motion, it is thereupon considered that said motion be overruled, to which action of the court defendant then and there excepted and still excepts.

Comes on also to be heard the motion of plaintiff for certain information called for in its petition, and the court, having on a former term ordered and directed that defendant furnish said information, and the court at this term reconsidered said petition, revokes, annuls, and sets aside the order made at the former term and denies to plaintiff the right to require defendant to furnish any information other than that already furnished, and to which action of the court plaintiff then and there excepted and still excepts.

Comes on also to be heard also the demurrers of plaintiff to defendant's first and second pleas, and the court having heard and considered the same, it is ordered by the court that said demurrers be overruled and plaintiff allowed to file replications instanter, affidavit of merits being waived.

58 The motions of plaintiff to combine and consolidate the two suits is sustained after plaintiff's motion to substitute the personal representative, Mrs. Maude E. Green, admx., in the first suit is sustained without objection by defendant.

Motion to require plaintiff to furnish bill of particulars.

Now comes said defendant by attorneys and moves the court to require said plaintiff to furnish the name and address of each person mentioned or referred to in plaintiff's declaration as possessing the knowledge or information which charged the defendant with knowledge in law as to the alleged oppressive and malicious conduct, temperament, character, and disposition of defendant's engineer, Zack McLendon, and also the name and address of the officer or agent of the said defendant who knowingly retained said McLendon in defendant's employ with such knowledge, and as ground for said motion said defendant says that said defendant can not know what officer or person authorized to receive notice on behalf of defendant will be required as witnesses without such information being furnished by said plaintiff.

TALLY & MASON,
WELLS, MAY & SANDERS,
Attorneys for defendant.

Filed 2nd day of January, 1920. T. J. Mixon, clerk.

Motion to amend declaration.

Comes the plaintiff, Mrs. Maude E. Green, adult, and Alfus Green, a minor 11 years of age, and Hamilton Green, a minor 10 years of age, and Jessie Louise Green, a minor 7 years of age, and Mary Green, a minor 4 years of age, by said Mrs. Maude E. Green, adult and mother as next friend, and move the court for leave to amend the declaration herein filed so as to name and substitute
59 as plaintiff in said suit Mrs. Maude E. Green, administratrix of the estate of Jesse Green, deceased, and for cause of motion assigns the following reasons:

1. That the said Mrs. Maude E. Green is the widow of, and the said Alfus Green, Hamilton Green, Jessie Louise Green, and Mary Green are the children of, the said Jesse Green, deceased, and under the laws of the State of Mississippi may maintain said action against said defendant as the heirs of the said Jesse Green, deceased, in their individual capacities, or the said widow, Mrs. Maude E. Green, may maintain the same as the legal representative in the capacity of administratrix of the estate of the said Jesse Green, deceased; and at the time of the filing of said suit it was the information and belief, and still is, of the said plaintiffs named in said declaration, the widow and children of the said Jesse Green, deceased, that the said cause of action was controlled by the statutes of the State of Mississippi and the common law as the same now prevails, but the defendant filed a plea or pleas in which it denied that the cause of action alleged in said declaration is controlled by the State laws and alleges in said plea or pleas that the said cause of action is controlled by the Federal laws; if the facts developed in the trial of the case should

show that the Federal and not the State laws control the said cause of action, the same having been brought in the name of the widow and children as the heirs of the said Jesse Green, deceased, could not be maintained, but would be dismissed, for the reason that the legal representative of the estate of the said Jesse Green, deceased, only could maintain the action under the Federal law, the law being that Mrs. Maude E. Green, the widow and one of the heirs of the said Jesse Green, deceased, as administratrix of the estate of the
60 said Jesse Green, deceased, could maintain said action against said defendant under either the State or Federal law and under both the State and the Federal law in so far as the capacity to sue is concerned, and the real plaintiffs in interest, the subject matter of the litigation and the defendant being the same, said declaration ought to be amended so as to substitute as plaintiff in lieu of the individuals therein named as plaintiffs Mrs. Maude E. Green, administratrix of the estate of Jesse Green, deceased.

2. It would not and could not injuriously affect the rights of the defendant to make said amendment and the ends of justice require that the same be made.

ED. DENT,
CURRIE & CURRIE,
Attorneys for plaintiff.

Filed 1/8/1920. J. S. Garraway, clerk.

Instructions for plaintiff.

1. The court charges the jury that if they find for the plaintiff in assessing the damages they may take into consideration the age, health, and expectancy of the deceased, Jesse Green, also the age, health, and conditions of plaintiff and her four children, and you would also have a right to consider his earning capacity and render such verdict as will compensate them for such pecuniary damages as may be shown by the evidence that they have sustained by reason of the death of said Jesse Green.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

61 2. The court instructs the jury that if as many as nine jurors or more agree upon a verdict they may return it as the verdict of the jury.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

3. The court instructs the jury for the plaintiff that if you find a verdict for the plaintiff, in assessing the damages, if any, which you may believe from the testimony was sustained because of the death of the said Jesse Green, you may take into consideration his age and condition of health at the time of his death, his earning capacity, as shown by the evidence in the case, if any, and his ex-

pectancy; and also the ages and conditions of the health and expectancies of his widow and children as shown by the testimony, if any, and award such sum as you may believe from the evidence in the case will reasonably compensate the widow and the children who were dependent upon him, if you believe they were dependent upon the said Jesse Green for the pecuniary loss, if any, sustained by them on account of the death of the said Jesse Green.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

4. The court instructs the jury for the plaintiff that in this case, while the defendant did not guarantee to its servants or to this plaintiff that the engineer on the switch engine or in its yards at Hattiesburg should be absolutely safe and competent, yet it was bound to exercise proper care to get a person in all respects fit for the place; and if, after defendant had employed such engineer, it learned or had reasons to believe that he was a quarrelsome,
62 vicious, and dangerous man, it was its duty to discharge him.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

5. The court instructs the jury for the plaintiff that the deceased had a right to presume under the law that his master would employ reasonably safe coemployes and would only keep in its employ such coemployes as remained reasonably safe; that it was not the duty of deceased to inquire into or to pass upon the character of any of his coemployees, but that, to the contrary, it was the duty of the defendant to exercise ordinary care to see that such coemployee remained reasonably safe, so that the law before you can say the deceased assumed the risk of McLendon's vicious and dangerous character; if you believe he had such character, you must believe he knew of such character, if any, and appreciated the danger of working with him. If, therefore, you believe from the evidence that deceased, Green, did not know of McLendon's vicious and dangerous character, if any, and did not appreciate the danger of working with him, then in such case he did not assume the risk, and you should so find.

Given.

Filed May 8, 1920. J. S. Garraway, clerk.

6. The court instructs the jury for the plaintiff that if the defendant was careless, retaining in its service a quarrelsome, vicious, and dangerous engineer on said engine, and on account of such quarrelsome, vicious, and dangerous disposition, if any, of such engineer while he was engaged in the master's business he unjustifiably
63 shot and killed Jesse Green, in such case the railroad company is liable to the plaintiff for the damage resulting from such death.

Given.

Filed May 8, 1920. J. S. Garraway, clerk.

7. The court instructs the jury for the plaintiff that the master or employer is legally bound to use due care not to expose the servant in conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

8. The court instructs the jury for the plaintiff that sound sense and public policy require that railroad companies should not be exempt from liability to their employes for injuries resulting from the quarrelsome and vicious and dangerous character of coemployes, if any, when by the exercise of proper diligence such injuries might be avoided.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

9. The court instructs the jury for the plaintiff that if you believe from the evidence in this case that McLendon, the engineer in the yard at Hattiesburg, was of a quarrelsome, vicious, and dangerous character and disposition, and if you believe from the evidence
64 this rendered him incompetent, and if you believe such incompetency, if any, was the proximate cause of the injury to and death of Jesse Green and that a difficulty was wrongfully provoked by him while he was engaged in the master's business, and if you believe in such difficulty he wrongfully killed Jesse Green, then, if the agents or servants of this defendant whose duty it was at the time to employ and discharge him if unfit did not exercise due care in the employment of McLendon, or if after he was employed they in fact knew that he was a quarrelsome, vicious, and dangerous man, then the railroad company is liable to the plaintiff for the death of said Jesse Green and you should so find.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

10. The court instructs the jury for the plaintiff that while the burden of proof is on the plaintiff to make out her case she is not required to make the proof beyond a reasonable doubt, but all that is required is for her to make out her case to the satisfaction of the jury by a preponderance of the testimony; and if you believe from a preponderance of the testimony in the case that McLendon bore a bad reputtation for peace or violence among the men at the yards where he and the other men worked and that his foreman or superior officers knew of his reputation as such, or could have known with the exercise of ordinary care, then the defendant is liable to the plaintiff for damages if you further believe from the testimony that he assaulted and killed Jesse Green not in self defense while they were engaged in and about the business for the defendant.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

65 *Refused instructions.*

1. The court instructs the jury for the plaintiff that in all actions brought against any common carrier by railroad under and by virtue of the provisions of the employers' liability act to recover damages for a death, the fact that the employe may be guilty if contributory negligence does not bar a recovery, but the damages, if any, shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

In this case, if you should decide under the instructions of this court and the evidence in the case that the defendant was guilty of negligence and that its negligence caused or contributed to the death of Jesse Green and that the defendant is liable for such death, then in such case, even if you believe the deceased, Jesse Green, was also guilty of negligence in remaining in the employ of the defendant company and insisted upon his priority, thereby securing the day shift, which placed him at work with McLendon, then in such case you are not to decide this cause against the plaintiff for that reason only, but you are to reduce the damages, if any, in accordance with the rule stated above.

Refused.

Filed May 8th, 1920. J. S. Garraway, clerk.

2. The court instructs the jury for the plaintiff that the law is that mere contributory negligence, no matter how gross, does not, in a case like this, bar the right of recovery, but such negligence, if any, goes only to the mitigation of damages, if any, for the injury
66 sued for and to which contributory negligence, if any, of the injured party contributed, if the defendant also be guilty of negligence which contributed to the same injury; under the law in this case, if the jury should believe that the plaintiff's deceased, Jesse Green, was guilty of negligence in remaining in the employment of the defendant and in demanding that he be restored or put back on the same train with McLendon, the employee who afterwards killed him, knowing that McLendon did not like him and was quarrelsome, vicious, and dangerous, yet if you further believe from the testimony in the case that McLendon was a man of quarrelsome, vicious, and dangerous character, and that the defendant knew this, after hiring him found it out, by the exercise of reasonable care and caution could and ought to have found it out, and with such knowledge or duty to know kept him in its employment and as a proximate and direct result thereof Jesse Green was by him shot and killed while both were engaged in the master's business and that such shooting was not in self-defense, then it is the sworn duty of the jury to find a verdict for the plaintiff.

Refused.

Filed May 8th, 1920. J. S. Garraway, clerk.

The court charges the jury that if they believe from the evidence that the deceased Green was guilty of contributory negligence that

does not bar a recovery on that ground if they further believe from the evidence that the defendant was also guilty of negligence that contributed to his injury and death.

Refused.

Filed May 8th, 1920. J. S. Garraway, clerk.

67 *Instructions for the defendant.*

1. The court charges the jury for the defendant that the burden rests upon the plaintiff to show by a preponderance of the evidence in this case that Engineer Zack McLendon was a dangerous character with whom to work, and that the defendant in this case knew that he was such a dangerous character, for his *em*-employees to work with, or by reasonable diligence should have known that he was a dangerous character, and unless the plaintiff has shown that the said engineer was of such dangerous character, and that the defendant knew it, or should have known it, the plaintiff has failed to make out her case, and it will be the sworn duty of the jury to find for the defendant.

Given.

Filed May 8, 1920. J. S. Garraway, clerk.

2. The court charges the jury for the defendant that the master is not an insurer of the character of its employees for peace and violent and is not responsible for their acts and conduct with their fellow employees unless it has been shown by the evidence in this case that the defendant negligently retained the said servant in his employment after the fact became known, or should have been known, that he was a vicious and dangerous employee with whom his fellow employees were required to work, then in that event the plaintiff would not be entitled to recover and it would be the sworn duty of the jury to so find.

Given.

Filed May 8, 1920. J. S. Garraway, clerk.

68 3. The court charges the jury for the defendant in this case that Zack McLendon was a competent and safe employee to work with at the date of his employment, and that the railroad company had a right under the law to presume that he would continue to remain a competent and safe employee with whom his coemployees could work until it had motive of or knew that he was unsafe, and in this case the burden is on the plaintiffs to show that he became an unsafe employee, with whom it was dangerous to work, and in addition thereto that the defendant knew that he was unsafe and dangerous to work with, and unless the plaintiff has met this burden by a preponderance of the evidence it is the sworn duty of the jury to let their verdict be, "We, the jury, find for the defendant."

Given.

Filed May 8, 1920. J. S. Garraway, clerk.

4. The court charges the jury for the defendant that Engineer Zack McLendon and the deceased, Jesse Green, were engaged in interstate commerce together with the common master at the time the said engineer killed Green; and if the jury believe from the evidence in the case that the deceased Green demanded and obtained the position of engine foreman in the crew in which Engineer McLendon was working, after he had formerly worked with the said Zack McLendon and knew him and his dangerous and vicious character, if any, then the said Jesse Green assumed the risks of the dangers incident to working with the said McLendon, and in that event it would be the sworn duty of the jury to find for the defendant.

Given.

Filed May 8, 1921. J. S. Garraway, clerk.

69 The court charges the jury for the defendant that if they find from the evidence in the case that the engineers had a contract with the defendant whereby a rule of seniority provided that the engineer, Zack McLendon, could choose and hold the position of switch engineer on the day run in the city of Hattiesburg, and that he did so select and hold said position, and that the conductors and trainmen had a contract with the defendant in which rule of seniority was provided under which the said Jesse Green was entitled to the position of engine foreman on the day run in the yards of Hattiesburg and that the said Jesse Green selected and obtained the position of engine foreman on the day run with the engineer, Zack McLendon, by reason of his seniority with a full knowledge and understanding of McLendon's vicious and dangerous temper, if any, then the court tells you that the law in this case is that the said deceased selected his own fellow servants with whom to work, and the defendant is not liable for the killing of the said Jesse Green by Engineer McLendon under any theory of the case, and it will be the sworn duty of the jury, if they so believe, to find for the defendant.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

5. The court charges the jury for the defendant that if they believe from the evidence in the case that the said Jesse Green knew Engineer McLendon and his character, and knowing the same insisted upon and compelled the defendant to give him the position of engine foreman in the crew and over the said engineer Zack McLendon by reason of his, the said Green's, rights under the seniority rule of the contract, and that the said Jesse Green entered upon
70 discharge of his duty as engine foreman and worked with the said Zack McLendon, in that event the defendant was not negligent in the furnishing of a coemploye with whom the said Jesse Green should work, and it is the sworn duty of the jury in

that case to find for the defendant, provided the said Green well understood his character and appreciated the danger, if any.

Given.

Filed May 8th, 1920. J. S. Garraway, clerk.

Defendant's refused instructions.

1. The court charges the jury in this case to find for the defendant Walker D. Hines, agent for railroads.

Refused.

Filed May 8th, 1920. J. S. Garraway, clerk.

2. The court instructs the jury for the defendant that the evidence in this case conclusively shows at the time said Jesse Green was killed by Zack McLendon, that they were employees of the defendant engaged in moving cars and trains engaged in interstate commerce. That the deceased assumed all the risk incident to said employment except such as might have arisen by virtue of the violation of a statute for the government of employees, which is not the case here, and therefore the defendant is entitled to a verdict, and the jury shall so find.

Refused.

Filed May 8th, 1920. J. S. Garraway, clerk.

70½ 3. The court further charges the jury for the defendant that the burden of proof that the said Zack McLendon was a vicious or dangerous or violent man with whom for his co*m*-employees to work, and that that fact was known, or by the exercise of ordinary care could have been known by the defendant railroad company, and that proof that Zack McLendon was a man who insisted upon switching cars and performing his duty and that of his co-employees strictly according to the rules laid down by the railroad company and as required by the laws of the State of Mississippi, and that he was contentious with his co-employees about it being done that way does not constitute proof of a violent or vicious character unless they have shown by a preponderance of the evidence to the satisfaction of the jury that his contentions and disputes with his co-employees amounted to more than simply contentions on his part to observe the law and observe the rules of the company, the plaintiff has wholly failed to meet the burden, and the law is with the defendant, and you should so find.

Refused.

Filed May 8th, 1920. J. S. Garraway, clerk.

4. The court charges the jury for the defendant that the contracts between the defendant and the engineers and the contract between the defendant and the conductors and trainmen are binding obligations upon the defendant and are obligations which the defendant could not legally violate. And if it is shown in this case from the evidence that under the terms and conditions of the said contracts

that the defendant could not deny McLendon the right to work on the engine on the day-run switching in the yards of Hatties-
71 burg, and could not deny to the engine foreman, Green, the right to work on the day run in the yards at Hattiesburg without violating the terms of his contract, then in that event the defendant did not violate any duty that it owed McLendon or Green in permitting them to work together, and it is not liable for what either might do to the other and is not liable in this case for the death of the said Jesse Green at the hands of Engineer McLendon; and if the jury find as a matter of fact that such are the facts in the case, it will be their sworn duty to find for the defendant.

Refused.

Filed May 8th, 1920. J. S. Garraway, clerk.

Judgment.

This day this cause came on for hearing, and both the plaintiff and the defendant appeared in person and by attorney and announced ready for trial. A jury of 12 good and lawful men, composed of B. C. Patrick and eleven others, having been empannelled, sworn, and charged to try the issue joined between the plaintiff and defendant, and after hearing all the evidence offered upon the trial and receiving the instructions of the court retired to consider of their verdict and presently returned into open court the following verdict. "We, the jury, find for the plaintiff and assess her damages at $35,000.00." It is therefore ordered and adjudged by the court that the plaintiff, Mrs. Maude E. Green, administratrix of the estate of Jesse Green, deceased, do have and recover of and from the defendant, Walter D. Hines, Director General of the United States Government and agent of the United States Government in use, control, possession, and operation of the Gulf and Ship Island Railroad Company, a corporation, the said sum of $35,000.00, together with all costs
72 of court for which let execution issue.

Motion for new trial.

Comes the defendant in the above-styled cause by his attorneys and moves the court to set aside the verdict of the jury returned on a former day of this term for $35,000.00 and to dismiss the said cause; or if the court should be of the opinion that said cause should not be dismissed, then to set aside the judgment and grant defendant a new trial for the reasons hereinbefore set forth.

1. The declaration in this cause failed to state a cause of action under the Federal employers' liability act, and the demurrer to the special pleas filed by the plaintiff should relate back to the declaration and be sustained thereto and the said cause dismissed.

2nd. In the trial of said cause, the court permitted the plaintiff to prove over defendant's objection the reputation of Engineer McLendon among the employees of the defendant with whom he worked,

which is shown by the evidence to consist of a crew of five men, to establish general reputation for the purpose of charging the master with constructive notice of McLendon's quarrelsome, vicious, and dangerous character. General reputation for peace and violence must be proven by general reputation in the community in which he resides. A reputation among a small crew of colaborers is insufficient to establish general reputation from which constructive notice to the master may be imputed as a matter of law. The action of the court in admitting this proof was error.

3rd. The court permitted the plaintiff over the objection of the defendant to show specific acts of violence of the engineer, McLendon, immediately preceding the fatal tragedy in which Green lost his life at the hands of McLendon, as proof of the character
73–74 of McLendon, and the said testimony to said facts were introduced over the objection of the defendant and without proof of actual knowledge of McLendon's character having been brought home to the defendant, the master; upon the theory that the reputation of McLendon for peace and violence among his colaborers was constructive notice to the master of the dangerous character of McLendon. The action of the court in admitting this testimony over the objection of the defendant was error.

4th. At the conclusion of the evidence offered by the plaintiff in chief the defendant moved the court to exclude the evidence and charge the jury to find for the defendant for the reasons that are assigned in the record on said motion. The court overruled this motion, and the action of the court in so doing was error.

5th. At the conclusion of the evidence in the trial of this cause the defendant requested the court to grant a general charge to the jury that there was no liability shown and that they should find for the defendant. This instruction was on the theory that since the cause of action is controlled by the Federal employers' liability act the voluntary wilful and designed murder of Green by McLendon was the turning aside from the duties of the master momentarily and entering upon an enterprise of his own for the purpose of redressing some real or fanciful wrong for which acts the master was not liable. The court refused this requested instruction, and the action in so doing was error.

6th. At the conclusion of the testimony the defendand requested the court to charge the jury that the defendant assumed all the risks incident to the employment except such as might have arisen by virtue of the violation of the statute for the government of employees which is not the case here, and therefore the defendant
75 was entitled to a verdict. This instruction was asked on the theory that under the pleadings and evidence in the case the Federal employers' liability act controlling, there was no liability, and that the jury should be so instructed. The court refused this instruction and in so doing committed error.

7th. The court granted to the plaintiff instructions No. 1, 2, 3, 4, 5, 6, 7, 78, 9, and 10, all of which instructions were erroneous ex-

cept instruction No. 2, and in granting the said nine erroneous instructions the court improperly announced the law of the case and so doing misled the jury, to the damage of the defendant. For that reason the judgment cannot stand.

8th. The court refused instructions No. 3 and 4 requested by the defendant and refused by the court, which have not been heretofore referred to, and in so doing committed error to the damage of the defendant, and for that reason the judgment should be set aside.

9th. In the rendering of a verdict in this cause for $35,000.00 the jury disregarded the measure of damages by which a recovery under the Federal employers' liability act shall be measured and returned, a verdict influenced by prejudice and passion greatly in excess of the amount for which a recovery could be had if there was a liability. Under the rule laid down by the Supreme Court of the United States a deduction of pro rata share must be made from the earning for the support of the deceased, and the remaining part, which is shown to have been contributed to those entitled to sue, must be figured upon its present worth. In this case, under the evidence*d* introduced by plaintiff that the deceased's life expectancy was 29 years, the present worth could not exceed $16,884.32, apportioned $4,851.987 to Mrs. Maude E. Green, $3,607.842 to Mary Clayton Green, $3,160.521 to Jessie Louise Green, $2,818.659 to Hamilton Green, $2,428.314
76 to Alfus Green. The judgment for $35,000.00 is in excess of this amount, is unwarranted under the law, and must be set aside.

10th. On the trial of the said cause the court permitted the introduction of evidence over the objection of the defendant, as is shown by the records in this case, which admission of the testimony was erroneous, and for that reason the verdict should be set aside.

11th. On the trial of said cause the defendant offered evidence, which offered evidence was objected to by the plaintiff and which objections by the court was sustained and the evidence excluded. This action of the court was error prejudicial to the defendant and the verdict therefor should be set aside.

12th. And for other causes to be shown at the hearing.

TALLY & MASON,
T. J. WILLS,
Attorneys for motion.

Filed May 15, 1920. J. S. Garraway, clerk.

Order overruling motion.

This day this cause came on before the court on motion of the defendant to set aside the verdict of the jury and to dismiss the said cause or to set aside the verdict of the jury and grant a new trial in said cause, and the court having heard the argument of counsel and duly considered the same is of the opinion that the said motion should be overruled. It is therefore ordered that the said motion to set

aside the verdict and to dismiss said cause or to set aside the verdict and grant a new trial in said cause be, and the same is hereby, overruled, and to which action of the court in overruling said motion the defendant, Walker D. Hines, agent, then and there excepted, and his exceptions so made were allowed by the court in due form.

77 Upon the overruling of the said motion the defendant requested the court for 60 days from this date in which to prepare, tender, and have signed a general bill of exceptions incorporating the record of all things done and performed in the trial hereof, and which request of the court was duly granted, and the defendant is hereby allowed 60 days in which to prepare and present and have signed by the court a general bill of exceptions.

Done, ordered, and adjudged in open court on this the 15th day of May, 1920.

ROBERT S. HALL, *Circuit Judge.*

Notice to stenographer.

MAY 15, 1920.

MRS. JENNIE F. SMITH,
Official Court Stenographer:

You are hereby notified that an appeal is desired and has been taken in the case of Mrs. Maude E. Green vs. Walker D. Hines, agent of railroads, tried in the Circuit Court of Forrest County on the 6th, 7th, and 8th days of May, 1920. Said appeal being taken by the defendant, and you are requested under the provisions of law to transcribe and file your stenographic notes taken in said cause to become and form a part of the original record in said cause.

Respectfully,

T. J. WILLS,
Attorney for defendant.

I, T. J. Wills, attorney for the defendant in the above-styled cause, certify that I have mailed to Mrs. Jennie F. Smith, official stenographer, notice to transcribe the notes in the above-styled cause in accordance with law.

T. J. WILLS,
Attorney for defendant.

Filed 5/25/1920. J. S. Garraway, clerk.

78 *Notice of appeal.*

MRS. MAUDE E. GREEN, ADMINISTRATRIX OF THE ESTATE OF Jesse Green, deceased, plaintiff,
vs.
WALKER D. HINES, AGENT OF RAILROADS, OPERATING THE GULF and Ship Island Railroad, defendant.

Whereas, by proclamation of the President dated December 26, 1917, and April 11, 1918, the President took possession and assumed

control of systems of transportation and the appurtenances thereof and appointed William G. McAdoo Director General of Railroads, including the Gulf & Ship Island Railroad, made defendant in the above-styled case; and

Whereas the Congress of the United States in the Federal control act, approved March 21, 1918, among other things, provided that suits should be brought against carriers while under Federal control only to the extent and in so far as they might not otherwise be inconsistent with any order of the President; and

Whereas in General Order No. 50 issued by the director general in conformity with the authority previously given by the President of the director general is acting in the premises by the authority of the President and for and on behalf of the United States of America, and for that reason no supersedeas bond or other security shall be required of the director general aforesaid in any court for the taking of or in connection with an appeal as a condition precedent to the prosecution of any such appeal; and

Whereas, by act of Congress of February 28, 1920, the railroads aforesaid were turned back to their private ownership and by said act the President was authorized to appoint an agent of railroads, and by proclamation of March, 1920, the President did appoint Walker D. Hines agent of railroads;

79 Notice is hereby given to the honorable clerk of the Circuit Court of the county of Forrest to send up the record in the above-styled cause to the Supreme Court of the State of Mississippi as is done in case of appeals from the Circuit Court to the Supreme Court in instances where bonds required by statute have been filed.

WALKER D. HINES,
Agent of Railroads,
Per B. E. EATON,
Attorney.

Filed 5/22, 1921. J. S. Garraway, clerk.

In the Circuit Court, April term, 1920.

STATE OF MISSISSIPPI, *Forrest County.*

MRS. MAUDE GREEN, PLAINTIFF,
vs.
GULF & SHIP ISLAND R. R. & WALKER D. HINES, ADMINISTRATOR, DEFENDANT. } No. 2155.

I, Jennie F. Smith, official stenographer of the twelfth judicial district of the State of Mississippi, do hereby certify that the following is a tru' and correct transcript of all the oral testimony of the witnesses in the above-styled cause tried at the April, 1920, term of the Circuit Court of Forrest County, State of Mississippi, before the Honorable Robt. S. Hall, judge, and a jury.

Appearances:

Currie & Currie, E. L. Dent, and J. W. Cassedy, representing the plaintiff.

T. J. Wills, Tally & Mason, representing the defendant.

Mrs. Maude Green, plaintiff, being first duly sworn, testified as follows:

Q. What is your name?

A. Mrs. Maude Green.

Q. What relation did you bear to Jesse Green?

80 A. His wife.

Q. How long were you married?

A. 12 years.

Q. Is Jesse Green living or dead?

A. Dead.

Q. When was it that he died?

A. August 5th, 1918.

Q. You were living here—you and Jesse Green—in Hattiesburg?

A. Yes.

Q. How long have you lived in Hattiesburg?

A. 12 years.

Q. Did you have any children?

A. Yes.

Q. You have not been married but once?

A. No.

Q. How many children did you and Jesse Green have?

A. Four.

Q. Are they in the court room now?

A. Yes.

Q. I will ask you to call the names of each and give the age.

A. Alfred.

Q. Will you stand up, please, Alfred? Is that Alfred?

A. Yes.

Q. What is his age?

A. Age 12.

Q. The next?

A. Hamilton.

Q. Stand up, please; is that Hamilton?

A. Yes.

Q. What is his age?

A. Ten.

Q. Now, the next.

A. Jesse Lewis, age eight.

Q. And one little girl?

A. Yes; Mary Clayton, age five.

Q. Prior to the time of your husband's death state to the jury the condition of his health.

81 A. Good health.

Q. Physically strong?

A. Yes.

Q. In what business had he been engaged prior to his death; what work was he doing?

A. Railroad-yard foreman.

Q. How long had he been engaged in that particular capacity?

A. About five years—no; about eight.

Q. Working for the G. & S. I.?

A. Yes.

Q. At the time of his death what was he earning?

A. From five to seven dollars per day.

Q. What was his age at the time of his death?

A. Thirty-one.

Q. I will ask you to state what your husband's habits were with reference to the support of yourself and the children—what did he do with his money?

A. Gave it to me and the children.

Q. Were living on it?

A. Yes.

Q. How long had he been accustomed to spend his money in this way?

A. During our whole married life.

Q. Did you see him after his death?

A. I did.

Q. Do you know what the cause of his death was?

A. Only he was shot.

Q. Did you see the wounds in his body?

A. Only in the head.

Q. He was dressed by some friends?

A. Yes.

Q. What was your husband's habits with reference to drink—did he drink?

A. Did not.

Q. State what his custom was with reference to regularity—that is, whether he was a man who worked regular and came home regular?

A. Worked regular and came home regular.

Q. Spent his time with his family?

82 A. Yes.

Q. State to the jury what the condition of your health is at this time.

A. Good health.

Q. And has been prior to this?

A. Yes.

Q. And the children?

A. Yes.

Q. Good health, too?

A. Yes.

JOHN GOIN, witness for the plaintiff, being first duly sworn, testified as follows:

Q. Your name is John Goin?
A. Yes.
Q. Did you know Jesse Green in his lifetime?
A. Yes, sir.
Q. Do you know Mr. McLendon?
A. Yes, sir.
Q. Did you work with Jesse Green and McLendon prior to Jesse Green's death?
A. Yes.
Q. How long did you work with them?
A. About eight or nine months.
Q. How long working with Jesse Green?
A. About the same.
Q. In what position did you work and in what position did they work?
A. I was switchman and Mr. Green was the foreman and Mr. McLendon was the engineer.
Q. And you were operating a switching crew?
A. Yes.
Q. The person that is usually called a conductor when you speak of a switching crew is called a foreman?
A. Yes.
Q. That is the position Jesse Green held?
A. Yes.
Q. McLendon was operating the engine?
A. Yes.
83 Q. What railroad were you working on?
A. G. & S. I.
Q. Did you have a day shift and a night shift?
A. Day shift.
Q. Were you at work on the day Jesse Green got killed?
A. Yes.
Q. Do you know about what time of day it was when he got killed—whether morning or evening?
A. Morning.
Q. What day was it, John; do you know what day of the month and the year?
A. 1918, 25th day of August.
Q. On the 5th day of August, was it not?
A. Yes; that's right.
Q. At what time did you go to work that morning?
A. Six-thirty.
Q. And the shooting was in the afternoon?
A. In the morning.
Q. About what time in the morning was the shooting?
A. About 8.20 or 8.15.

Q. You all had been working only a short time?

A. Yes.

Q. Was any one else in the crew besides you and those you have named; was there a fireman?

A. Yes.

Q. Who was he?

A. Will Owen.

Q. You know where Will Owen is now?

A. No, sir.

Q. Was anyone else in the crew?

A. Hugh Mixon.

Q. Do you know where Hugh Mixon is now?

A. No, sir.

Q. Are either of these two witnesses in Hattiesburg?

A. Not that I know of.

84 Q. I will ask you to state to the jury what, if any, trouble occurred with McLendon on that morning.

We object, and the ground of our objection is that we are not trying McLendon, and it is not pertinent to the issue in this case and not material; further, that this witness knows nothing of the difficulty in which Jesse Green lost his life, be can be introduced for one purpose and one only, to drag before this jury another separate difficulty had with this Negro prior to this time. The question asked by counsel was about a difficulty on the morning of the alleged homicide, and it is not apparent from the question whether it has reference to the difficulty from which the homicide grew, but if it did, it is incompetent and irrelevant here for the reason that how the difficulty occurred as between McLendon and the deceased Green would not be competent as against the defendant in the civil suit; and so far as the fact that McLendon killed Green, that has been tried and adjudicated by a jury in the criminal trial, and which we will admit that McLendon was tried and convicted of the murder of Green.

Mr. CASSEDY. Are you willing to admit that Green was wrongfully killed by McLendon?

A. No, sir.

The COURT. I am going to permit you to show by one witness what occurred; then I am not going to permit you to show what occurred the day of the killing.

Counsel for plaintiff objects to the ruling of the court in refusing to allow us to introduce but one witness to show the circumstances of the homicide; that the circumstances of the homicide can not be proven by any one witness as the circumstances of the homicide are proven by several witnesses testifying through different circumstances.

85 Jury is retired and the following testimony taken:

Q. You say there was some trouble between you and McLendon on the day Jesse Green was killed?

A. Yes, sir.

Q. Where did that trouble start and what was it about?

A. It was about giving a signal; I gave him a signal two or three times and he called me up to him and told me: "Had he not told me about giving him a signal two or three times when it was only necessary to give him a signal but once," and told me——

Q. And told you what?

A. Told me not to give the signal but once—done told me about It two or three times; and I said I was working according to Mr. Green's instructions the best I could. We goes on to the south yard. Mr. Green said: "Let's go boys." We highballed to go to the south yard—we had four coaches and the coal hoist—and I come on and flagged the crossing and after we got across the crossing here in town I got up on the foot board with my back to him and just before we got to the brickyard he come out on the running board and hit me two licks.

Q. What did he say with reference to Green?

A. He said: "I'll give you taking Mr. Green's instructions giving me signals two or three times—I'll kill you and Green both; God damn you."

Q. Was that when he struck you?

A. Yes.

Q. How far was that from the place where Green was killed?

A. Quarter of a mile.

Q. In order that it may be clear to the court—what was his warning about giving the signal two or three times?

86 A. He told me not to give a signal but one time; he would see them, but it was customary to give them more than once because he might not see them.

Q. When he told you what?

A. I said I was trying to work the way Mr. Green instructed me to work the best I could.

Q. How did Green tell you to give the signal?

A. Give the signal until I thought he saw them.

Q. Within a quarter of a mile of where Greene was killed this conversation was had with McLendon on the steps?

A. Yes.

Q. And that was when he knocked you off?

A. Yes.

Q. You were carried to the hospital?

A. Yes.

Q. And not present at the time Greene was killed?

A. No.

Q. After you were knocked from the engine who was left to throw the switch?

A. No one on the front end with the engine at all but the fireman and McLendon.

Q. You were on the front end for what purpose?

A. Throw the switch when we got to the South yards.

Q. After you were knocked off by McLendon who else was on the train to throw the switch?

A. Mr. Green, his duty.

Q. He was back on the train somewhere?

A. Yes.

Cross-examination:

Q. This first conversation you say you and McLendon had was in the yards here before you left—up here by the depot?

A. Yes.

Q. That was when the crew—Hugh Mixon, yourself, fireman, and McLendon—were all up here in the yards?

87 Yes; all up here in town.

And Mr. MrLendon told you how to give signals?

A. Yes; told me not give but one.

Q. And that he would see it?

A. Yes, sir.

Q. Now you got on the running board and went on to the South yard?

A. No, sir; was not on the running board.

Q. How did you get the South yards?

A. Never did get there.

Q. You were going down that way?

A. Yes.

Q. How far did you go on the footboard?

A. Just before I got to the brickyard.

Q. Somewhere about a mile and a quarter to the South yards?

A. You could say that.

Q. There was a difficulty between you and McLendon?

A. Between here and here.

Q. Say between here and the South yards in which McLendon hit you with a hammer?

A. Yes.

Q. Who went with you to the hospital?

A. Hugh Mixon.

Q. You were not anywhere near the place where this killing occurred?

A. No, sir.

Q. You did not even see the shooting?

A. No, sir.

Q. Did not hear them?

A. No, sir.

Q. You don't know anything about how they fought or anything about it?

A. No, sir; I did not testify that I know anything about the killing.

Q. And what you want to tell about is your and McLendon's fuss?

88 A. Yes; I was telling about the way he hit me and what he said about killing Mr. Green.

Q. You told him that Greene told you to signal that way?

A. I told him I was working the best I could under the instructions of Mr. Greene.

Q. And then he told you that he would kill you and Greene both?

A. Yes.

Q. That was prior to this difficulty that occurred down there; I mean before this shooting?

A. Yes.

Q. And you did not see the killing and don't know anything about how it happened?

A. No, sir; did not see it.

Mr. CASSEDY. In addition to the testimony of this witness will say that we have another witness who will testify in reference to statements made by McLendon at the time of the shooting; that at the time the shooting occurred—just in a few seconds after this conversation with Goin occurred—in fact, as soon as the engine arrived at the switch, the engine being then running, and running until it arrived at the switch about a quarter of a mile, where Goin said this conversation occurred. The purpose of this testimony is to tend to prove that McLendon was engaged in a dispute about the master's business, to wit, switching signals; and it proposes also to show that McLendon by his act had removed the head brakeman from the engine, making it necessary for Greene to come forward and throw the switch; also tending to prove that since McLendon knew that Jesse Green would come forward to throw the switch, and since he had stated to this witness he intended to kill him—that tends to show the nature
89 of the same matter—that is an act beginning by knocking this witness Goin off the front of the engine with his hammer and ending in the shooting of Jesse Green, the foreman, at the switch.

The court sustains the motion to exclude or the objection to the introduction of this testimony for the reason that there is nothing to indicate that some special act of violence on the part of McLendon was communicated to the master, and the court is of the opinion that no special act in the conduct of McLendon would be admissible to go to the jury unless communicated and known by the master.

Mr. CASSEDY. Witness that was present at the shooting will also testify in reference to a statement made by McLendon at the time he shot Jesse Green and it's being introduced for the purpose of showing what the dispute was about. Do you hold that is admissible also?

COURT. No, sir; I am going to let you show by some witness all the facts.

Mr. CASSEDY. This witness who will testify to that conversation is a very poor witness—so far as the shooting is concerned, practically nothing. Do I understand it that when we introduce him we are confined to that one witness as to an eyewitness to the shooting?

The COURT. Yes; the defendant has admitted that Green was killed by McLendon—there is no question about that shooting. As to whether they were about the master's business has not been admitted; and I am going to let you show that, for the reason that it

is necessary for you to show that they were about the master's business and not for the purpose of detailing the killing.

Jury is here returned into court.

HOOD KNIGHT, witness for the plaintiff, being first duly sworn, testified as follows:

90 Q. Your name Hood Knight?
A. Yes, sir.
Q. You live here in Hattiesburg?
A. No, sir; Sanford.
Q. You were living here at the time Jesse Green was killed?
A. Yes, sir.
Q. What business were you engaged in at that time?
A. Working for the G. & S. I. R. R. Co.
Q. In what position?
A. Car inspector.
Q. How far were you from the place where Green was shot?
A. I suppose about 50 or 60 yards.
Q. Did you see the train when it stopped there?
A. Yes, sir.
Q. What business were you engaged in at that time?
A. Inspecting some passenger coaches from the yard to Camp Shelby.
Q. How far was the track on which you were inspecting those cars from the switch track over which McLendon was going to put the passenger cars he had?
A. We were on track No. 2, and they were right together.
Q. A main line between the two tracks?
A. Yes; main line for No. 1 and No. 2.
Q. And the train had not got in to the switch track?
A. No, sir.
Q. Did you see McLendon or Green there on that occasion?
A. Yes, sir.
Q. State what you saw and heard.
A. A switch engine run up to the switch stand where they open the switch to go in—leads into the yard—and it run up there and staid about two or three minutes and stopped and McLendon got down off the engine and walked right down toward the front end from the door where he come out of the engine, and in a few
91 minutes Greene come down from the rear end of the cars—had three or four cars and had to go around the engine, and he had started on to open the switch, and McLendon—Green had to come around him to get to the switch, and as he got opposite him McLendon asked him "why the hell he had not opened the switch"; they stood there and talked a few minutes and——
Q. You know what they were talking about?
A. That switch.
Q. Where did you go?

A. I was right at the end fixing to go down the other side—had inspected up one side.

Q. How far had you gone when the shot fired?

A. About the length of one coach.

Q. Did you see him fire the gun?

A. No, sir.

Q. You did not see the shooting?

A. No, sir.

Q. You know how many shots were fired?

A. No, sir.

Q. Did you go to the place where the shooting was?

A. Yes; started to go back.

Q. Why did you not go back?

A. We went to put our tools up and started to go home as fast as we could, me and the man with me——

Q. Anyone stop you?

A. We got up pretty close, and McLendon had a pistol in his hand and said, "Don't come this way—stop; go back."

Q. Did you see Greene afterwards?

A. Yes.

Q. Do you know what was the cause of his death?

A. Yes.

Q. What was it?

A. Bullet in his face.

Q. He was dead when you got there?

92 A. Yes.

Q. Did you see anything in McLendon's hands when he asked Greene "why in the hell he had not opened the switch"?

A. I seen something looked like a pistol.

Q. Did you see anything in Greene's hand?

A. No, sir.

Cross-examination:

Q. Do you tell this jury that Jesse Green came out the back end of that train and walked by the side down to that engine where McLendon was?

A. Yes; when I seen him he was coming right down side the cars.

Q. How many cars in that train?

A. Three or four.

Q. And you swear that he got off the back end and walked along the side of the train down to where McLendon was?

A. He was going down when I seen him.

Q. Do you swear he got off the back end and walked down to where McLendon was with the pistol in his hand?

A. He was walking when I seen him.

Q. Just answer my question; didn't you swear he got off the back end and came on down to where McLendon was?

A. That was the way I——

Q. You saw him?

A. Yes, sir.

Q. Did he do that?

A. Of course he could——

Q. Did you testify at the preliminary trial of McLendon for the State?

A. No, sir.

Q. Did you testify at the habeas corpus trial for the State?

A. No, sir.

Q. Did you testify at the final trial before the jury?

93 A. No, sir.

Q. This is the first time you have ever been on the witness stand telling about what you heard and saw at that place?

A. Yes; I know it is, if I am not mistaken.

Redirect examination:

Q. At the time of the shooting both these parties were on the ground?

A. Yes.

Q. Train stopped still?

A. Yes.

Q. Not being operated then at all?

A. No.

Q. Did you know McLendon before this time?

A. Yes.

Q. How long had you known him?

A. I guess five or six months.

Q. Do you know what his general reputation was for peace or violence among his fellow-workmen there?

(Objection; overruled; exception.)

A. It seemed to me——

(Objection to what it seemed.)

Q. Do you know it—his general reputation for peace or violence?

A. Only what people told me.

Q. You knew then what they said?

A. Yes.

Q. Was it good or bad?

A. I would call it pretty bad.

Recross-examination:

Q. Whom did you hear talk about it?

A. Mr. Jacobs.

Q. Who else?

A. Jacobs and several of the boys.

Q. Jacobs; that is one.

A. Yes.

94 Q. Who else?

A. After it occurred—Mr. Evans.

Q. Not after it occurred—before that time?

A. In fact, it was talked by the boys there that he had killed one man before.

Q. We will ask you to name another man.
A. Mr. Sullivan.
Q. You know Mr. Sullivan, don't you?
A. Yes.
Q. He was a star witness in the criminal trial, was he not?
A. I don't know.
Q. All right, name another one—that all you can recall now?
A. Mr. Evans told me——
Q. Just give the names of the men you heard talking about it before this trial occurred.
A. That is all.
Q. Mr. Jacobs and Mr. Sullivan; that all?
A. Yes.
Q. Mr. Jacobs is Mr. Sullivan's son-in-law, is he not?
A. I believe he is.
Q. You know it, don't you?
A. Yes, sir.

Redirect examination:

Q. Who was Mr. Evans?
A. He was the foreman.
Q. What position did he hold with the railroad?
A. Superintendent of the yard.
Q. Were you, McLendon, and Jesse Green all under him?
A. Yes.
Q. He was over the whole works?
A. I reckon they were under him—I don't know. I was.

95 Recross-examination:

Q. What Evans was that?
A. I don't know his name.
Q. Don't know his first name?
A. I think it was W. F.
Q. You think his initials are W. F.?
A. I think so, I am not positive.
Q. Don't you know, as a matter of fact, W. F. Evans was not the superintendent of Greene or McLendon?
A. I thought I said I did not know whether he was their superintendent or not.
Q. So you don't know?
A. No, sir.
Q. So far as you know of your own knowledge you don't know whose superior he was?
A. He was mine—the car inspectors and car repairers.
Q. But you don't undertake to say he had any control over Greene and McLendon, do you?
A. No, sir.

Redirect examination:

Q. You say he was superintendent; what do you mean by that; what was the position he held?

A. He seen to the cars being repaired.

Q. Was he general superintendent of the whole yard?

A. Yes; he seen to the repairing of the cars as they come in on the yard.

Q. What is the name of his position—do you mean by superintendent he was superintendent of the whole works?

A. I suppose so.

(We object to supposing.)

Q. Do you know what jurisdiction he had?

A. No, sir.

Q. All you know is they called him superintendent?

A. Yes.

Q. You don't know who he was over?

96 A. No, sir.

Q. Did he have power to employ any of the servants of the railroad?

A. Car repairers and inspectors.

Q. You don't know whether he had any further power than that or not?

A. No, sir.

(Defendant moves to exclude all the testimony except that with reference to the general reputation of McLendon—as to what he said and heard.)

(Overruled; exception.)

F. M. Sullivan, witness for the plaintiff, being first duly sworn, testified as follows:

Q. You name is F. M. Sullivan?

A. Yes.

Q. You live here in Hattiesburg?

A. Yes.

Q. Did you know Jesse Green prior to the time he was killed?

A. Yes; I knew him.

Q. Did you know Mr. McLendon?

A. Yes.

Q. How long had you known McLendon prior to that time?

A. For eight or ten years.

Q. In what work were you engaged at the time of this shooting?

A. I was not working for the G. & S. I. at the time but lived near there.

Q. Are you working for them now?

A. No, sir.

Q. Had you prior to that time worked for the G. & S. I.?

97 A. Yes.

Q. In what capacity?

A. I had charge of the lights and switches here in town.

Q. The lights and switches?

A. Yes; in both yards.

Q. Did you know the general reputation of McLendon for peace or violence among his fellow workmen?

A. Pretty bad.
(Objection.)
Q. Do you know it?
A. Yes; I knew it.
(Objected to as leading.)
Q. The first question is, if you knew his general reputation for peace or violence?
A. I knew it by hearing the talk among the men on the yard.
Q. And what would you say, was it good or bad?
A. Pretty bad.

The court please, Mr. Sullivan was an eye witness; do I understand your ruling that we will not be permitted to go any further into the shooting?

The COURT. Go ahead.

Q. Where were you when this shooting occurred?
A. Sitting in my living room, next to the G. & S. I. track, when the shooting was going on; you want me to state——
Q. Tell right on what you heard, what you did, and what you saw.
A. While I was sitting there reading I heard the first two shots, "pow, pow," that way, and then a half minute continued to shoot and then another; then I got up and run out there to where the right of way is and about the time I got to the wire fence and saw McLendon reloading his gun as fast as he could, he said, "You stop; don't come any further." I said, "What is the matter?"
98 He said, "Nothing; nothing; you stay there, don't come up here," and threw his gun up and stopped me at the fence. I did not go back; I put my hands up on the fance and watched him; he was walking up and down the engine and tender with his gun in his hands; he turned round and come back next to the steps and stooped down and looked under there, and when he did I looked through and saw the body of a man.
Q. On the opposite side?
A. Yes; on the east side from me; I was on the west side; he walked there a few minutes and went back down next to the cab and called his fireman——
(We object to further of these details.
Overruled; exception.)
Q. Go ahead, Mr. Sullivan.
A. He walked up and down, as I said, with his gun in his hand, and said to his fireman to come out there and go down——
(Object for the reason we don't think McLendon's conversation would be competent as against us, the Government, in this matter—it is hearsay absolutely for some other man to detail what he said.
Overruled. Exceptions.)
Q. Go ahead.
A. "Will, come down from the cab and run down in the yard to telephone for Harbison." While Will was gone he walked to the front end of the engine and got a pin and walked around with it and

behind there and walked up to the coach and went through, with his gun in one hand and the pin in the other; he got down on the other side and the piece of iron was left over there; he came back without the iron, and by that time Harbison had gotten down there and Harbison hollered and told him to come on down to the coach;
99 they extended down to the crossing—anyway, the rear end of it reached back to the street—and Harbison come in there and through the coach and the crowd went on over there. He would not let them come down there before Harbison got there. When Harbison got there he——

The COURT. Don't tell what Harbison did.

Q. Did you go up to the body yourself?

A. No, sir.

Q. When you got there did you see the iron pin there?

A. Haribson had picked it up and had it in his hand.

Q. You saw it in his hand?

A. Yes.

Q. Was that the kind of pin you say McLendon had?

A. Yes.

(We object because it is not relevant and we are not trying McLendon in this case.

(Overruled; exceptions.)

Cross-examination:

Q. Do you know anything about the employment of McLendon and Greene as to what each duties were and how they discharged those duties?

A. No; a little something about it; they did not get along on the works.

Q. But do you know how they discharged their duties—McLendon was engineer?

A. Yes.

Q. Greene was the conductor?

A. Foreman switch engine.

Q. He had charge of and the direction of the switch crew?

A. Sure did.

Q. He gave McLendon instructions about how he would do and McLendon worked under Greene's instructions?

A. Sure did.

Q. And McLendon's duty was to obey Greene's instructions,
100 was it not?

A. Yes.

Q. You speak, Mr. Sullivan, of the reputation that it was bad; is it not a fact that the only trouble you heard detailed in which his reputation was assailed was that McLendon would not disobey the rules of the company and that Greene and the switchmen all went after him because he would not make flying switches and cross the railroad crossings that were in violation of the rules?

A. Something about the work they disagreed.

Q. That is what it was—McLendon would not violate the rules of the company—the others would when they saw no danger, but McLendon would not do it?

A. They disagreed on the work.

Q. That was his reputation for disagreement with his men were about because he would not dis*boye* the rules—would make them flag the crossings ahead of the train whether in sight or not?

A. I would not be sure about that; they disagreed—all I know.

Q. That is what you have reference to when you say his reputation was bad?

A. Bad and fractious, bad.

Q. He never had any fight with anyone; you never heard of that?

A. Sure, good many things he did; killed his brother-in-law for one.

Q. You talk about killing his brother-in-law; you don't know that he killed in self-defense?

A. I said he killed him; I don't know about killing in self-defense.

Q. You didn't know the jury acquitted him and said he was justified in killing him; did you know that?

A. No answer.

Q. Was that all the things you had reference to?

A. I still say he had a bad reputation.

101 Q. Did you ever have any trouble with McLendon?

A. Not particularly.

Q. You were not on the best of feelings with him?

A. Yes; I thought as much of one as I did the other; both looked alike to me.

Q. Did you ever work with them?

A. Worked around them—passing them.

Redirect examination:

Q. Did you know who the bosses of the railroad were at that time?

A. At the time Greene was killed?

Q. Yes; and prior to that time—you know Stevens?

A. He was yardmaster.

Q. He was immediately over McLendon?

A. Yes.

Q. Do you know whether the bosses of the railroad knew of McLendon's reputation for violence?

A. I don't know that.

Q. Do you know whether Stevens knew that?

A. I suppose he did.

(Object to supposing.)

Q. Do you know he knew it?

A. I could not say I did know that he knew it.

J. H. CHANCY, witness for plaintiff, being duly sworn, testified as follows:

Q. Your name J. H. Chancy?

A. Yes.
Q. You live here in Hattiesburg?
A. Yes.
Q. Did you know Jesse Green in his lifetime?
A. Not personally.
Q. Did you know McLendon?
A. No.
Q. Where were you at the time the shooting occurred?
A. Yes; a short distance away.
Q. Did you see the train when it came up?
102 A. I could not say that I saw the train when it come up, but I knew the train was there, but did not pay attention to it.
Q. Train stop there?
A. Yes.
Q. How long had the train stopped before the shooting occurred?
A. Some few minutes.
Q. Quite a few minutes?
A. I would say four or five minutes.
Q. Did you see Jesse Green?
A. No, sir.
Q. Did you see McLendon?
A. Yes.
Q. State what you saw occur there.
(Defendant objects as this man said he did not see the killing and did not know either of the men; and in detailing the occurrence of the homicide which we object to on the ground that it is incompetent and immaterial in so far as this case is concerned.)
(Overruled for the present; exceptions.)
Q. Did you see Jesse Green go down toward the switch?
A. No, sir.
Q. State what you did see.
A. I saw the man that was doing the shooting and the direction in which he was shooting—seemed more in the direction of the switch than it was the other part of the train—the train was headed toward the switch.
Q. Who was the man shooting?
A. McLendon.
Q. You die not see Greene at all?
A. No.
Q. Where was Greene?
A. The first I saw him was after he was shot; but the shooting was in the direction of the front end of the engine toward the switch.
103 Q. Just describe what you saw McLendon do?
A. I did not see the first shot, but I looked far enough to see the smoke of the pistol from the first shot—by the time I looked he was ready to shoot again and he had his pistol pointed as though some object he was shooting was trying to get away——
(Object to what it seemed. Sustained.)

Q. State what he was doing without stating your impressions.

A. He had his head toward the switch when I looked at him and I looked far enough to see the smoke from the first shot and by the time I looked he was ready to shoot again and he shot in this direction; like this table was the engine, he was standing near the head and he shot down this way at some object and then he turned and come back down towards the tender or front end of the first coach, a little back of the tender, and stooped down and fired under the first coach.

Q. Did you see him fire any more?

A. He fired once more after he fired under the coach, then he came back and got up in the steps as though he was going to take his seat; that is, he entered the cab and got out of my sight, and fired again from the other side.

Q. You did not see that?

A. No.

Q. Did you afterwards go on the other side?

A. After it was over and the train moved on.

Q. Did you see Green over there?

A. Yes.

Q. Where did you find him with reference to the direction in which the shooting was in?

A. A little back of where the object was that he was shooting at on the opposite side of the track.

104 Q. How far back?

A. I judge 15 feet.

Q. You know how many times Greene was struck?

A. I could not say positive how many.

Q. How many did you see?

A. Saw one in the head—did not go to the body.

Q. See any in the body?

A. Don't remember that I did.

Q. What became of the train after the shooting?

A. McLendon took it on into the yard.

Q. Into the switch?

A. Yes.

Cross-examination:

(Defendant moves to exclude this witness's testimony with reference to the details of this tragedy.

Overruled; exception.)

Q. You don't know what Greene was doing during this time; you did not see him?

A. Did not.

Q. Did not see him at all?

A. Not until I went to him.

Q. He was dead when you saw him?

A. Yes.

Q. And you did not see Greene and McLendon just before the first shot was fired, did you?

A. No.

Q. You don't know what these two men were doing that started this shooting, do you?

A. No, sir.

G. C. GODWIN, witness for the plaintiff, being first duly sworn, testified as follows:

Q. Your name G. C. Godwin?

A. Yes.

Q. You live here in Hattiesburg?

A. Yes.

Q. Did you know Jesse Greene during his lifetime?

A. Yes.

105 Q. What business are you engaged in?

A. Railroad man when I knew McLendon and Greene; working for the G. & S. I.

Q. What position did you hold?

A. Yard foreman and storeroom keeper.

Q. How long had you known McLendon?

A. Until I came here *here* and went to work.

Q. How long had you worked here?

A. Went to work in June 1914.

Q. Since 1914 you had been acquainted with McLendon?

A. Yes.

Q. Did you know McLendon's reputation for peace or violence among his fellow workmen?

A. I did after I went to work here.

Q. Was it good or bad?

A. Very bad.

Q. State if you know if the superintendent or boss of the railroad knew it also.

A. Yes.

(Objected to because it is an opinion and not a fact.

Overruled; exceptions.)

Q. How do you know that they knew about it?

A. For one reason, Mr. Leonard, supt. had me in the office to find out if I knew what the trouble was between Greene and McLendon—they had controversies in regard to handling the switching—not only mine but others.

Q. And you told them about it?

A. Yes; Mr. Leonard and Mr. Dawson.

Q. Who is Dawson?

A. Yardmaster and agent here.

Q. And McLendon's reputation was discussed?

A. Yes.

Q. And you say they knew about it?

A. I told Mr. Leonard no one could get along with McLendon, he had gotten so irritable and disagreeable.

106 Cross-examination.

Q. How long did you work with the G. & S. I. R. R.?

A. Went to work in June 7th, 1914, and worked until the 2nd day of January, 1916.

Q. So you reported to Leonard that Greene and McLendon could not get along?

A. I did not report it; he called me into the office on account of having some coupling on second I had instructions to unload some gravel there and he went up on the crossing and let a car pass by we moved up ahead, and Mr. Greene could not get him to back up again where we could unload the gravel; he would not pay any attention and I reported it to Mr. Leonard and he to Dawson.

Q. You wanted him to back up over the railroad crossing?

A. To where I had instructions to unload on the crossing.

Q. And no one flagged the crossing at the time?

A. Yes, sir; I was there, the crew, and Greene.

Q. You know why a man generally precedes the train in making the crossings and McLendon would not back up and go across except in the manner prescribed by the rules, don't you?

A. It was not a general crossing.

Q. But it was a railroad crossing?

A. Yes; it was a street crossing at Southern Avenue.

Q. And is it not a fact that the only trouble and the trouble you speak about was the fact that it was customary among railroad employees operating the G. & S. I. and all other railroads to disregard the rules and handle the trains in that way, and he would not do it except according to the rules?

107 A. We were up on this crossing, and a car came up, and he pulled across the crossing, and when the car got by could not get him back.

Q. No one in sight, and it was the custom under those conditions to disregard the rules, and McLendon would not do it at that time and at any other time cross without a man to go ahead to flag the crossing?

A. He did not on that occasion.

Q. And you reported to Dawson and Dawson to Leonard?

A. Yes.

Q. And then they separated McLendon and Greene and put Greene on another run?

A. They did.

Q. And kept them separated for quite a while until after you left there?

A. Yes; in January.

Q. You know anything about the rules of the company in regard to seniority or advancement of employees?

A. I do.

Q. Is it not a fact that you could not discharge an engineer except on good causes shown?

A. Only the master mechanic.

Q. Except on good cause shown; he could not, under a contract, discharge them.

A. I don't know anything about the contract.

(Objection to the statement that they could not discharge the engineer except on good cause shown; that is a separate matter; sustained.)

Q. That is all you know about it—his reputation?

A. I know several other instances while he was working here, because I handled all my material inside the yard limits, and have a great deal of material from the Brookhaven Lumber Co., and it would depend upon his humor about how he would handle the train.

108 Redirect examination:

Q. I will ask you if this book I hand you is the Book of Rules?

A. Yes.

Q. That is the rules in force at the time of this killing?

A. Yes; this covers every capacity from engineer down to section foreman.

Q. Will you turn to page 60 and state if rule 226 was in force at that time?

A. I can't see without my glasses. [Reads rule 226.]

Q. That is the rule of the company at that time?

A. Yes, sir.

I now offer said rule 226 in evidence, which is as follows:

"Employees who are dishonest, immoral, quarrelsome, or otherwise vicious will not be retained in the service."

Q. I will ask you to look at rule 589, page 187, under heading of "Yardmaster"; I will read it: "Must report to the superintendent or trainmaster all disobeying of rules coming under their notice; also report all cars arrived in damaged condition."

Q. Was that rule in force at the time?

A. Yes; all those rules come under each department.

Q. Who was yardmaster at the time?

A. G. W. Dawson.

Recross-examination:

Q. Now, Mr. McLendon at the time of this accident had been in the employment of the company for 18 years?

A. I don't know about that; he was here when I came here?

Q. You did not know he had been working since 1900?

A. No, sir; was not here.

109 Q. And he was here when you left?

A. Yes.

RED MORGAN, witness for plaintiff, being first duly sworn, testified as follows:

Q. Your name is Red Morgan?

A. Yes.

Q. Do you know McLendon?
A. Yes.
Q. Did you know Jesse Green during his lifetime?
A. Yes.
Q. How long had you known McLendon prior to the time of the killing of Jesse Green—about how long?
A. I suppose some 12 or 15 years.
Q. Do you know what his general reputation for peace or violence was among his fellow workmen?
A. Only hearsay.
Q. Reputation is what I am talking about; you knew what that was?
A. Yes, sir.
Q. Was it good or bad?
A. It was bad; he was a very, very contrary man.
(Defendant moves to exclude the statement of the witness; he volunteered that he was a "very, very contrary man," because the question at issue is peace or violence; a good many people are contrary and not violent. Sustained.)

Cross-examination:

Q. He did have a reputation for running switch engines according to the rules?
A. Yes.
Q. He would not violate the rules when switching trains?
A. Yes, sir.

B. O. DOHERTY, witness for plaintiff, being first duly sworn, testified as follows:

110 Q. Your name B. O. Doherty?
A. Yes.
Q. You live here in Hattiesburg?
A. Yes.
Q. Did you know McLendon at and prior to the time when Jesse Greene was shot?
A. Yes.
Q. How long had you known him prior to that time?
A. Eight or ten years.
Q. Did you know his general reputation for peace or violence among his fellow workmen?
A. Yes.
Q. Was it good or bad?
A. Bad.
Q. Did you work for the railroad?
A. Yes.
Q. What position did you hold with the railroad?
A. I worked as watchman at the South yard shops for a while; then I was appointed to look after the engines in the South yards when war broke out to protect the engines.

Cross-examination:

Q. You did not wor*o* for the crew that handled the trains?

A. No, sir—in the yards at night.

Q. Was he switching in daytime or nighttime?

A. Daytime.

Q. The worst complaint about him was that he would not switch trains except according to the rules?

A. I don't know about that—the men could not get along with him.

Q. You did know that he would not violate the rules of the company with reference to switching trains—you know that was the general report?

111 A. I believe I have heard that.

Q. And that was the source of the trouble there was it not?

A. I just know the men could not get along—the men were always complaining.

Q. Usually it was the men and switchmen he worked with?

A. Yes.

Redirect examination:

Q. Those were the people he was usually with was it not?

A. Yes.

Recross-examination:

Q. If they complained to the head of the department and when investigated the investigation showed that they complained because he would not violate the rules—then he would be in the clear would he not?

(Objection; sustained; exception.)

M. Jacobs, witness for plaintiff, being first duly sworn, testified as follows:

Q. Your name M. Jacobs?

A. Yes.

Q. Did you know McLendon prior to the time he killed Jesse Green?

A. Yes.

Q. How long did you know him prior to that time?

A. About two years.

Q. What work were you engaged in at that time?

A. Derrick engineer for the G. & S. I.

Q. Do you know McLendon's general reputation for peace or violence among his fellow workmen prior to the time of killing Greene?

A. Not very much of it; no, sir.

Q. Did you know any of it—his reputation is wha*r* people said about him?

A. I heard two sides.

112 Q. Did you hear two sides?

A. Yes.

Q. From what you heard was it good or bad?

A. Both ways.

Cross-examination:

Q. You say you heard it both ways?

A. Yes.

Q. And most of the talk you heard was he would not violate the switching rules, would not switch except according to the rules.

A. He lived up to the rules.

Mr. DeWitt, witness for plaintiff, being first duly sworn, testified as follows:

Q. Your name DeWitt?

A. Yes, sir.

Q. Did you know McLendon prior to the time of the killing of Jesse Green?

A. Yes, sir.

Q. How long did you know him?

A. Several years.

Q. What work were you doing during that time?

A. Sheet metal works——

Q. For the G. & S. I.?

A. No, sir.

Q. With whom?

Mississippi Blow Pipe Co.

Q. Is that at or near the G. & S. I. track?

A. By the side of the track.

Q. Did you know McLendon's general reputation among his fellow workmen for peace or violence?

A. I did.

Q. Was it good or bad?

A. Bad.

Cross-examination:

Q. How old are you?

A. Twenty-eight.

113 Q. How long have you known McLendon?

A. Some seven or eight years.

Q. All that time he was working for the G. & S. I.?

A. Yes.

Q. When you first knew him he was there?

A. Yes.

Q. And as a matter of fact, if you are 28 and you lived here most of that time——

A. Eighteen or twenty years——

Q. And McLendon was engineer for that road all that time?

A. I could not say.

Q. All the time that you knew him he was?

A. Yes.

Q. As a matter of fact, was not most of the complaints you heard about was because he would not violate the switching rules in handling the trains?

A. I could not say that.

Q. Was it not the general information that he was one engineer that switched by the rules?

A. Yes; and he would get contraty, and one day he would go to the yard at a certain speed and the next day another speed; most of the people that worked with him in handling the engine could not get along with him.

Q. And that was the trouble growing out of the switching or the way the switching was done?

A. Not the way it was done; but the men could not get along with him.

Plaintiff now offers in evidence the judgment of conviction in the case of State *v.* McLendon, showing he was convicted of murder for the killing of Jesse Green, which was read to the jury.

Plaintiff rests.

114 *Motion by appellee for peremptory instruction.*

Comes Walker D. Hines, agent of the railroads, defendant in this case, and moves the court to exclude the evidence in said case and peremptorily charge the jury to find for the defendant.

1st. Because it is not shown that any notice was brought to the knowledge of those in charge of the operation of the railroad under Government control of any vicious or dangerous habits of the engineer, McLendon.

2nd. Because it is shown that the homicide was committed not in the apparent scope of the authority and not within the scope of the authority which the said McLendon was employed, and was not employed to do violence to men; and that the controversy was between himself and his foreman under whose charge or direction he was to act, and a competent conscious human being, and was not directed by nor advised as shown by the record in this case by the defendant in this case.

3rd. For the further reason that if it were shown that the engineer McLendon was disagreeable or violent in his disposition, it was not shown that the knowledge of such facts were brought to the agent of the Government in the operation of the railroad who had the power and authority or who were charged with the duty of hiring and discharging engineers, or Engineer McLendon.

4th. Because it is shown by the evidence in this case that in the year 1914 that the engineer, McLendon, and the deceased, Jesse Green, were working together and that they had a difficulty, that the same was reported to the superintendent and that he separated them; and the evidence shows in this case that at the time of the unfortunate tragedy that Jesse Green, the deceased, was the
115 foreman in charge of the switching crew, and was working and controlling under him, McLendon, the engineer; and does not show that Green had ever requested that Engineer McLendon be

discharged or that he be moved from the position of engineer under him. And for further causes to be shown.

Overruled; exceptions.

Request of plaintiff to reopen his case and introduce Mr. DeWitt and Mr. Godwin.

Plaintiff would respectfully request the court that they be allowed to reopen their case and introduce Mr. DeWitt and Mr. Godwin, both these witnesses having testified on yesterday, for the purpose of questioning each of them with reference to the notice to the company of the character of McLendon. We stated to the court that while both these witnesses testified yesterday that we did not know yesterday as to DeWitt's knowledge of this fact and consequently did not ask it—just learned of the fact this morning. And as to Mr. Godwin, it is our information that he had testified on yesterday as to the actual knowledge of the company but on rereading the record, both by the court and counsel, we learned that we were mistaken, and we want to recall him to be more particular in his testimony on that subject.

This testimony is objected to on the part of the defendant—the jury having been retired the court proceeds to hear the testimony of the witnesses, withholding its ruling for the present.

Mr. DeWitt, being recalled by plaintiff, testified as follows:

Q. Your name is H. DeWitt?

A. Yes.

Q. You testified on yesterday?

A. I did.

116 Q. You testified as to the general reputation of McLendon for peace or violence among his fellow workmen?

A. I did.

Q. Did you know prior to August 5th, 1918, W. J. Stevens?

A. I did.

Q. What position, if any, did he hold with the railroad company?

A. Yardmaster.

Q. For whom?

A. G. & S. I.

Q. What place?

A. Hattiesburg.

Q. What? *D*is duty to do what, supervision over what—the railroad yards here in Hattiesburg?

A. What time he was yardmaster over there?

Q. I asked you, prior to August 5th, 1918, what he had supervision over—prior to that date?

A. Charge of the yards here in Hattiesburg.

Q. What do you mean by having charge?

A. Yardmaster over the yards—having charge of the switch engines and handling men in the yard.

Q. You worked for the railroad?

A. Yes.
Q. Are you familiar with the rules of the company?
A. Yes.
Q. Are you familiar with rule 582 of the Rule Book?
A. Yes.
Q. Will you read that rule, please, to the court?
A. "They will have charge of the yards located in their territory in which men are employed for the movement of trains and engines."
Q. And his territory was Hattiesburg?
A. Yes.
Q. Did you know McLendon before that time?
A. Yes; I have known him.

117 Q. What conversation, if any, did you have with John Stevens prior to the death of Green about the character of McLendon being vicious or fussy?

A. Stevens said that Greene and McLendon could not get along—said that McLendon was always falling out with Jessee and said he would have to discharge him—could not get along with anyone that handled the engine or even the switching; my younger brother was working over there and he and McLendon had a run in and for six or eight months did not speak—always fussing with the men.
Q. That included all the employees with whom McLendon had to work?
A. Yes.
Q. What do you mean by fussy?
(Objec' to what it means. Sustained.)
Q. State the conversation as best you can between you and Stevens.
A. He told me if they did not quit their fussing and could not get along he would have to discharge him.
The Court. Told McLendon that?
A. Yes; and McLendon said, "The son of a bitch had got his job and he was going to kill him."
Q. What was said between you and Stevens, if anything, about McLendon being a generally quarrelsome, vicious man?
(Objection; sustained.)
Q. What further was said as to the disposition of McLendon?
A. He went on to tell me about the trouble that he and McLendon had had himself.
(Objection; overruled.)
Q. Go ahead.
A. At the time he and McLendon had the trouble he was engine foreman and McLendon had turned him in—laid off work and went

118 to Gulfport to get him discharged—I am not positive whether he went or not—anyway they had the investigation and McLendon could not back up his statements made in Gulfport, and they had a few words over it, but can't say what they were——

Q. What other difficulty, if you know, if any, that John Stevens had with his com—employee?

A. He knew that McLendon tried to knock my brother in the head with a shovel.

(Objection to him saying he knew; that is not competent. Overruled.)

Q. What was said about, if anything, the general disposition, including all these rackets?

(Objection; sustained.)

Q. Did you have more than one conversation with him?

A. Myself, Stevens, and my brother were talking at different times about him.

Q. Go ahead and detail as best you can what was said about McLendon's disposition.

A. On one occasion Stevens said he was "the worst and meanest God damn man he had ever seen."

Q. The worst and meanest God damn man he had ever seen?

A. Yes.

Cross-examination:

Q. You testified yesterday?

A. I did.

Q. And you testified to tell the truth, the whole truth, and nothing but the truth?

A. Absolutely.

Q. You did not tell this yesterday?

A. I did.

Q. You have worked for the railroad company?

A. Had not worked for the G. & S. I.

Q. You were down there on the works, and a foreman was talking all this about his men to you?

A. This foreman is a brother-in-law of mine.

Q. And McLendon had turned him in at Gulfport for being drunk?

119 A. Yes.

Q. And he cursed about that?

A. Yes.

Q. Did this foreman have the right to discharge engineers?

A. At that time he was foreman, but at the present——

Q. As foreman could he discharge the engineer?

A. No, sir.

Q. So he was not the man that could employ or discharge engineers?

A. Not at that time.

Q. That was just before this killing occurred?

A. No, sir; Mr. Dawson was yardmaster and he was engine foreman.

Q. What time was it that Stevens was talking to you in this way?

A. He was yardmaster after he succeeded Dawson.

Q. I am asking you when it was you heard this conversation—what year?

A. We had different conversations at different times.
Q. When were they?
A. At different dates.
Q. What dates?
A. I can't be positive about the exact date.
Q. Was it in 1916, 17, 18, or 19?
A. 1918, part of the time was 1917.
Q. And at that time Stevens was engine foreman?
A. Yes.
Q. And did not have the power or authority to employ nor discharge?
A. No, sir; not at the time he was engine foreman.
Q. I am asking you at that time?
A. The yardmaster has charge of the men.
120 Q. When was Stevens made yardmaster?
A. I don't know.
Q. Was it before or after McLendon killed Green?
A. Before.
Q. How long before?
A. I don't know.
Q. Can yardmasters employ and discharge engineers?
A. They can turn them in if they don't do the work.
Q. If they do the work there is no occasion——
Objection because the rules are in writing.
Overruled.
Q. You read the rules of the railroad company just now; they did not give the yardmaster the duty to employ or discharge engineers, did it?
A. The yardmaster, if he saw fit to have a man taken out the service turned him in to the superintendent.
Q. Can he discharge or employ engineers so far as the rules are concerned?
A. The rules of the G. & S. I.? I can't say.
Q. So you don't know what the rules were?
A. No.
Q. When you testified on your direct, when you were asked about the rules you were mistaken, were you not, that you were acquainted with the rules?
A. I did——
Q. And he handed you the Rule Book; now, do you say you are or are not acquainted with the rules?
A. That is the Book of Rules.
Q. Then, with your acquaintance with the Book of Rules, do the Book of Rules provide that the yardmaster employs or discharges engineers?
(Objection; overruled.)
A. Not directly, he can't.
Q. He is not the man that can employ or discharge engineers?
A. Not directly.

121 Q. Now, then, you said in the conversation that you heard that McLendon said that the man who got his job he would kill him?

A. Yes.

Q. McLendon was the man who would not violate the Book of Rules and the law in handling the trains when switching, was he not?

A. Times he would and times he would not.

Q. And it mattered now how much they would signal him to violate the rules, he refused to do it?

A. There were times when he was mighty contrary—making switches when feeling bad he would do one way, and when he was feeling good he would do another way.

Q. How do you know?

A. By conversation with the brakeman, foreman, and switchmen in the yard.

Q. This is all hearsay on your part?

A. By the men working with him.

Q. You did not know it of your own knowledge?

A. No, sir.

Q. And you understood from what McLendon said they were after his job?

A. No.

Q. He said the man that got it?

A. The man that caused him to be fired.

Q. Then, he had reference to the man who got his job?

A. He was having trouble with the other men—he would be after him worse.

Q. He never was fired, was he?

A. I don't think so.

Q. He was working the day of the killing?

A. He was.

122 Q. And all this trouble they had was fussing about the way they did the work?

A. No, sir.

Q. What was the fussing about?

A. They gave him a signal, for instance, to kick a car hard, or if they happened to hit a car and check the engine a little bit more, he would refuse to kick the car, etc.

Q. It is a violation of the law to kick cars, was it not, and he had a right not to do it; and if that is tru', then he was not a fussy man?

A. If you remember, I stated a few minutes ago that there were times when he would go according to the Book of Rules and sometimes he would not; some days he would kick cars and some days he would not.

Q. The fussing would come up because he would not kick cars; that is tru'?

A. No, sir.

Q. With reference to kicking cars; wouldn't it come up because he would not kick the cars?

A. Possibly they would fuss about that.

Q. Do you know what they would fuss about with reference to kicking cars?

A. Sometimes he would kick the cars and sometimes he would not!

Q. Do you know of your own knowledge when the fussing was about kicking the cars—because he did not or did kick the cars?

A. I can't state whether he would or would not; as I stated a few minutes ago McLendon some days would kick the cars and some days he would not kick cars, and if the engine happened to kick down and hit the cars a little bit hard he would get sore and contrary.

Q. Will you tell the court how you *j*now that is tru'?

123 A. From the conversation with the switchmen that worked with him.

(I submit that is incompetent and m*p*ve to exclude from the record. Overruled for the present.)

Q. You never worked down there at all?

A. No, sir.

Q. Green was fussy there, was he not?

A. I can't say that he was.

Q. Don't you know that Green was very disagreeable and fussy!

A. No, sir.

Q. Will you say that he was not?

A. I don't think that he was.

Q. Do you know?

A. I knew Mr. Green for a good many years; knew him when he worked on the Southern.

Q. Do you know how Green happened to be working on the engine with McLendon?

A. I do not.

Q. If I understand you all you have told is just what you heard; it is all hearsay.

A. Yes.

Redirect examination:

Q. Who was the yardmaster prior and on the date McLendon killed Green?

A. Mr. Stevens.

Recross-examination:

Q. Do you mean to tell the court now that Stevens was derelict in his duty?

(Objection; sustained.)

Mr. Godwin, being recalled by the plaintiff, testified as follows:

Q. You were a witness on yesterday in this case?

124 A. Yes.

Q. You remember testifying about the general reputation of McLendon for peace or violence?

A. Yes.

Q. You remember stating a conversation you had with Mr. Dawson

A. Yes, on several occasions.

Q. That all occurred prior to the death of Green?

A. Yes; that was in 1915.

Q. Will you please tell the court the conversation between you and Dawson?

A. On what occasion? I had three or four conversations with Mr. Dawson about McLendon.

Q. About McLendon's reputation for peace and violence?

A. Like I said on the first occasion I reported this, and the next occasion was unloading some ties, and the third occasion was him trying to jump on a negro I had, named John Yates—drew a hammer on him and started down out of the cab with the hammer to hit the negro, and I told him to stop, and he got back and said he would see him the next day. I said to the negro to come back the next day, I would take it up with Mr. Dawson. I told Mr. Dawson about it, that McLendon run my men off, and I would lose the whole crew; they would not work around him.

Q. Why did you tell Mr. Dawson?

A. Because he was a dangerous character; he carried a pistol all the time either in the seat box or in his bosom. I saw it time and again.

Q. Would Dawson know anything about the pistol?

A. I don't know whether he saw it; I told Dawson about it.

Q. What about it?

A. Told him about McLendon carrying the pistol on the engine with him and on his person.

125 Q. What else was said?

A. Dawson told me "we will have an investigation of several of those stunts he has pulled off and we will try him once more; and if he pulls off any more, I am going to have him discharged——

Q. Those stunts; what did that mean?

(Objections; sustained.)

Q. What were you talking about when Dawson said this?

A. I was after Dawson to do something or my men would all quit me.

Q. Why would they quit you?

A. Because they were afraid of McLendon.

Q. Why?

A. Because he got after one negro with a hammer and having a pistol in his bosom—liable to make any negro afraid, and a white man, too.

Q. How come you to get in conversation with Leonard about it?

A. He called me in the office.

Q. What for?

A. To find out if I knew the trouble.

Q. State as best you can what the conversation was?

A. I told Mr. Leonard about the same thing I told Mr. Dawson—I told Mr. Leonard that McLendon went armed all the time with a gun on him, and that all the men working for him were absolutely afraid of him.

Cross-examination:

Q. That was in 1915?

A. Yes.

Q. You don't know of anything that happened after that?

A. No, sir.

126 Redirect examination:

Q. These two gentlemen, Dawson and Leonard, were they in the service of the raliroad in 1918 when McLendon killed Jesse Green?

A. Yes; and still are.

Q. What capacity was each in?

A. Leonard was in the car-service department and Dawson was agent.

Recross-examination:

Q. When did you leave the service?

A. June 2, 1916.

Q. For what cause?

A. Discharged.

Q. Your feelings have not been very good toward the company since?

A. No, sir; I will tell you why I was discharged. I sued one of the officials for what he owed me and tried to get my money and C—— tried to get me to withdraw the affidavit, and I would not do it, and he said he would do it and to meet him in Circuit Court. I got my money last January.

Q. You mean to say that man would not pay you and you sued him and you feel no ill will——

A. I have some good friends on the G. & S. I. and naturally a little ill will as between me and the party, J. W. Donahu.

Q. What capacity were you working in 1915?

A. Yard foreman and storeroom keeper.

Q. These conversations you had with Dawson you told him that McLendon would not back over the crossings, would not spot the cars, and would not—didn't you state that on your direct?

A. He did not ask me that question.

Q. I am asking you if you did not say that?

A. Yes; I made that remark.

Q. That was the truth, was it not?

127 A. I stated that to you yesterday afternoon.

Q. That is a fact, was it not?

A. Sure.

Q. You only told Dawson of one instance of trouble where McLendon exercised or showed any disposition to harm any one and that was when he got the hammer after your negro?

A. Yes; I thought that was sufficient.

Q. And Dawson said, "If McLendon pulled off any more of those stunts he would fire him"?

A. Yes.

Q. You ever tell Mr. Dawson he pulled oc any more stunts?

A. No, sir.

Q. After that did you tell him any more?

A. No, sir; did not see it was necessary.

Q. So far as Dawson was concerned McLendon perhaps after that might have been acting nice and smooth?

A. I can't say.

Q. So far as any notice you give him is concerned?

A. Yes.

Plaintiff now offers in evidence the rules in reference to yard-masters, rule 528:

"They will have charge of the yards located in their territory, of the men employed, and the movement of trains and engines."

The plaintiff comes now at the conclusion of the argument on motion to exclude which was considered by the court in the light of the testimony since it has been developed and authority read to the effect that the question of reputation ought to have been the general reputation of McLendon rather than his general reputation among the fellows with whom he worked, and in order to amend this question in the case counsel for the plaintiff now moves the court that they be allowed to reintroduce the witness now
128 present and ask them the same question with reference to McLendon's reputation, confining same to his general reputation.

The court overrules this motion, for the reason that over the protest of defendant's counsel the court permitted proof as to general reputation to be made in the manner as shown by the record.

The court overrules the motion for a peremptory instruction as asked for by the defendant.

The court also refuses to permit testimony of Witnesses De Witt and Godwin as testified to in the absence of the jury to go to the jury, for the reason that the witnesses were put upon the stand on yesterday, thoroughly interrogated as to their knowledge of this unfortunate tragedy; undertook to detail under their corporal oath all their information and while before the court failed to detail this testimony as preseted for the court's consideration; and while this perhaps is a question of fact, still it does not comport with the court's idea of that high class and high degree of testimony that should be considered by a jury in a case of this magnitude. However, the court considers that it has erred in refusing to permit plaintiff to show certain acts of violence on the part of McLendon which were not communicated or known to the defendant, and for that reason will reopen the case and permit plaintiff to show such acts, if any can be shown, on the part of McLendon; and to that extent will permit Witness Godwin, if the plaintiff desires, to tes-

tify as to certain acts that tend to show violence on the part of McLendon, as detailed this morning.

Defendant excepts to the overruling of motion for peremptory.

The jury is here returned.

129 JOHN GOIN, being recalled by plaintiff, testified as follows:

Q. Your name is John Goin?

A. Yes, sir.

Q. Did you know Mr. Green in his lifetime?

A. Yes.

Q. Did you know Mr. McLendon?

A. Yes, sir.

Q. What position did you hold with the railroad company prior to Mr. Green's death?

A. Switchman.

Q. What position did Green and McLendon hold?

A. Engineer and foreman.

Q. Green was foreman?

A. Yes.

Q. McLendon was engineer?

A. Yes.

Q. You were working with them on the day Green was killed?

A. Yes.

Q. What time did you go to work, and about what time did the shooting occur?

A. Went to work at 6.30 and the trouble occurred about eight—between 8.15 and 8.20.

Q. So you had been working less than three hours?

A. Yes, sir.

Q. And not over two hours?

A. Yes.

Q. I will ask you to state to the jury what you were doing prior to the shooting—what position you were in and what occurred.

(Objection to all this testimony; overruled; exceptions.)

Q. Go ahead and state.

A. That morning I gave him a signal about four or five times when he called me to him and asked me "hadn't he told me about giving him so many signals, one would be a plenty, that he

130 seed all signels"; and I told him I was doing the work the best of my knowledge and the way Mr. Green instructed me to work.

Q. That was early in the morning?

A. Yes.

Q. Where were you going and where were you at the time this last difficulty occurred?

A. We started to the South yards; Mr. Green said, "All right boys, let's go to the South yards" and I got on the foot board——

Q. The foot board is in what part of the train?

A. Front end of the engine.

Q. And the train was going this way toward the switch?

A. Yes.
Q. And Green and the other workmen, where were they?
A. On the rear end.
Q. Back behind the engine?
A. Yes; close to the tender when we pulled out.
Q. Whose business was it to open the switch?
A. Mine.
Q. State what happened.
A. After we pulled on down there I flagged Pine Street crossing, then we slowed up to let Hugh Mixon close the main-line switch; he high-balled us and I gave him the high-ball, let's go, and we started on, got to running about 15 to 20 miles an hour and he come out and hit me three licks—two back there [indicates on head] and one in front.
Q. How did he go to you?
A. Come on the running board through the window and walked up behind me.
Q. You were on the running board?
A. Yes.
Q. Had you been doing anything to him?
131 A. No more than give him signals.
Q. What did he say when he came around and struck you?
A. He said, "I'll give you giving me all these watch-out signals, I'll kill you—I am going to kill you and Green, too."
Q. How far was it from the place where this occurred to where Green got killed?
A. About a quarter.
Q. The switch Mr. Green got killed at was the switch you were going to open?
A. Yes, sir.
Q. When you were struck by him what did you say he struck you with?
A. Hammer.
Q. What became of you.
A. Fell off.
Q. Where did you go from there?
A. Took me to the hospital.
Q. Do you know of any other difficulty in which McLendon engaged prior to this time—difficulties he had with other people?
A. Yes; I know him to have fusses with men he——
(Objection to all this testimony; overruled; exception.)
A. I don't know the man's name, but worked with different men—he was a road man; was not on a regular run and——
Q. When was that?
A. That was the time I was working there.
Q. Was it during the same year in which Green was killed?
A. Yes, sir.
Q. Who was the man that this difficulty occurred with—I don't mean his name—but what was his position?

A. Field man.

132 Q. Part of the switching crew?

A. Yes.

Q. Was he part of the crew?

A. Yes, sir.

Q. Was it a white man or Negro?

A. White man.

Q. Where did it occur?

A. North end of the house-track switch.

Q. What was it that did occur between him and this man?

A. He gave him a signal and he would not obey it——

Q. And that was what the row was about?

A. Yes, sir.

Q. What did they do or say?

A. He was talking about what he would do to him with this gun, and this gentleman told him he would make him eat that gun up.

Q. Do you know whether McLendon carried a gun or not—what do you know about that?

(Defendant objects, because the railroad company would not be charged with any degree of negligence because its employees carried a gun—might have a right to carry a gun under the law.

The court sustains the objection unless violence is coupled with the gun.)

Q. Do you know of any other row that occurred at the time you were working there?

A. I remember another row he had with Mr. Green.

Q. How often would these things occur?

A. Nearly every day words passed at one another; they did not agree at all.

Cross-examination:

Q. How long had you worked there before this day on that switching crew?

A. For the G. & S. I.?

Q. Yes.

133 A. About 8 or 9 months.

Q. During the 8 or 9 months that you worked there McLendon did not strike any man until he struck you?

A. Not while I was on job.

Q. And you were on the day job with Green as foreman and McLendon as engineer?

A. Yes, sir.

Q. You say that nearly every day there came up a row—McLendon would not go across the crossings with his train until it was flagged, would he—that is what the row come up about?

A. Yes, sir; that is right.

Q. Other engineers would, but he would not; isn't that tru'?

A. I worked behind several and I flagged the crossing for them all.

Q. But he was a stickler for the rules; and if you gave him a signal to go forward without it being flagged, he would not do it?

A. I never gave a signal without flagging the crossing.

Q. And he would not violate the law or the rules in any way and these rows you speak of came up about the way they did the work, or whether he should obey the rules or not?

A. How is that?

Q. These little rows you speak of come up because you would give him the watch-out signal, and he would tell you to only give him one signal; is not that true?

A. Yes, sir.

Q. And that was what your row was about?

A. Yes; about giving him more than one signal.

Q. You said he had a row with another man; was not that what it was about?

A. He gave him a signal, and he would not obey it.

Q. How would he not obey it?

134 A. I don't know.

Q. Was not that where there was an order out there—was an engine—that you put an engine back on the track and not to move the engine until that was backed up and put in place?

A. No, sir.

Q. Will you tell me what the trouble was?

A. I don't know why he did not.

Q. McLendon did not obey the signal; then it was the man that forced the row and not McLendon?

A. No, sir; because he gave the signal two or three times and he did not move, and he give another and he hollered at him and said, "You think I am blind; I can see you." This man said, "You need not holler at me that way"—and that is the way it started.

Q. And when McLendon said something about the gun he said he would make him eat it up?

A. Yes.

Q. The other man had him completely blocked?

A. I don't know about that.

Q. The other fellow was worse than McLendon—he made him shell out and move and was going to make him eat the gun?

A. Yes; they rowed about fifteen minutes there.

Q. You don't know of any other row except the trouble with Green about the signals, do you?

A. We were froze up one morning and Mr. Green sent me to the engine; there was a lot of ice on the track and one of our cars had gotten off the track and Mr. Green sent me up to the engine to borrow the scoop to clean off the track; and he would not let me have it and hollered to Mr. Green, "Why don't you come and get it," and then he said, "No; you better not come up here."

135 Q. He told him to come and then told him not to come?

A. Yes; and Mr. Green said, no, he was not going up there.

Q. He did not offer to hurt Mr. Green, did he—made no attempt?
A. No, sir.
Q. And this other row with Green—was that before Green was on the night run or after?
A. I don't know; I was not working over there then.
Q. You wanted the company to pay you for McLendon hurting you, too, didn't you?
A. Yes; I asked for a settlement.
Q. You are very much interested for the company to be held liable for what McLendon did—to the extent that you would like to have a settlement?
A. They have not done it so far.
Q. That is the reason you are so interested; is not that right?
A. I am up here for the truth.
Q. What cars did you have that morning?
A. I did not take the numbers.
Q. Did you have two or three coaches?
A. When we were going to the South yards?
Q. Yes.
A. Yes.
Q. And were not those particular coaches used to move the soldiers to and from Camp Shelby?
A. I don't know what they were used for; put them on that evening, and then going to Jackson and bring them back.
Q. Loaded with soldiers and nothing else—were not used for general passengers, were they?
A. I can't tell you.
Q. They were not used for general passengers from Hattiesburg to Gulfport?
A. No; from Hattiesburg to Jackson.
136 Q. Unloaded them here with soldiers and carried to Jackson and loaded them and brought back the next evening?
A. Yes.
Q. That is tru', is it not?
A. Yes, sir.
Q. They were not used for any other purpose except to make those trips?
A. I don't know.
Q. So far as you know?
A. Yes.
Q. You had been handling them day in and day out?
A. Saturday evening——
Q. How long a time?
A. Ever since the camp was here.
Q. At this particular time you were taking them to the place where the cars were cleaned?
A. Yes.
Q. In order to bring them back and be loaded and carried to Jackson?

A. Yes; carried them to the South yard.

Q. Didn't you know that soldiers rode in those cars when they left here and went to Jackson?

A. Yes, sir.

Q. That is what they were used for?

A. I don't know who they loaded in them; I would be off duty when they were used.

Q. But you understood and knew they were the trains the soldiers were carried in, did you not?

A. Yes; I reckon they hauled soldiers.

Q. You knew that the coaches were set out and stood there until they were loaded the next Saturday?

A. Yes.

Q. And were not used for anything except for that trip to Jackson on Saturday night?

A. We used so many—sometimes we would have to put coaches on other trains——

Q. You did not use those coaches down there except to haul the soldiers with?

137 A. I don't know whether they were the same cars or not.

Q. But you did not use the coaches you kept down there and handled every Saturday night and Sunday except to haul the soldiers from the camp to Jackson in, did you?

A. I don't know whether they loaded soldiers in them or not; I want to tell the truth if I can.

Q. Were the regular passenger trains made up, do you know; were they made up here, Jackson, Gulfport, or where?

A. We did not make up any regular passenger trains here—no more than one or two——

Q. Don't you know that one makes up and starts at Jackson and Gulfport and passes here, and all you did was to put coaches on here?

A. Yes.

Q. And those coaches were put on when they got here and loaded and for the purpose of carrying soldiers?

A. No answer.

Redirect examination:

Q. You say you don't know anything about that, John?

(Object to as leading and suggesting.)

Mr. HUBERT HOLLIFIELD, witness for the plaintiff, being duly sworn, testified as follows:

Q. What is your name?

A. Robert Hollifield.

Q. How long have you lived in Hattiesburg?

A. Four years, about.

Q. Did you know Jesse Green in his lifetime?

A. Yes.

Q. You know McLendon?

A. Yes.

Q. Did you ever work with McLendon?

A. Yes.

Q. What was your occupation?

138 A. Switchman.

Q. Are you working for the G. & S. I. now?

A. No, sir.

Q. Were you working for them prior to August 5, 1918?

A. Yes.

Q. Did you work with McLendon while he was in the employ of the railroad?

A. Yes—it has been several years—I worked at two different times, I suppose, eight years—worked while McGregor was yardmaster and when Osborn was yardmaster.

Q. What was McLendon doing then?

(Objection as being too remote; overruled; exception.)

Q. In what capacity did you work in the crew?

A. I was helper on the switch engine.

Q. Were you at work then here in the Hattiesburg yard?

A. Yes.

Q. State to the court and jury if you know of any personal difficulty that McLendon while you were working with him as one of his coemployees.

A. He and I had several run ins at different times.

Q. What do you mean by "run ins"?

A. Fusses; one particular time we were passing the G. & S. I. depot. They have a rule that you walk ahead the engine—either back up or ahead until they get over Pine Street crossing—and this particular time I was walking ahead, and it seemed that he wanted to be contrary; I got a little too far ahead and he stopped. I didn't know what was the matter, and I sat down on the track; he stood there and I kept waiting there, thought something was the matter with the engine, and I walked back to the engine and found out the trouble; and when I got up there I asked him what the trouble was, and he made the remark, "I'll fix you, damn you, and show you what's the trouble." I walked on back to the depot and he

139 started to backing up pretty close to us, keeping pretty close to me; and different things that way.

Q. What about other coemployees that had to work with him?

(Objections; sustained.)

Q. State what else you know about his disposition and having difficulties?

A. The fact of the business is—he was always in a row with some of us on the crew; we could never get on with him—no one could get along with him; he always had something to fuss about.

Q. Did you know the reputation of McLendon for peace and violence in the community where he lived?

(Objections; sustained for the reason that the plaintiff was given an opportunity to show this on direct, and I am only permitting the plaintiff to show now what the court has announced it erred in in not permitting before the motion for a peremptory was asked.)

Cross-examination:

Q. You say this has been about eight years ago?

A. I don't say it has been exactly eight years—some seven or eight.

Q. Approximately about that time?

A. Yes.

Q. The trouble you had with him was because you had walked on and gotten a considerable distance ahead of him and he stopped, and when you came back told you he would show you what was the trouble, and he followed you on close enough for you to be flagging the train?

A. Yes.

Q. And what you have detailed that was said and what happened is what happened, was it not—what you told happened?

A. I don't understand what you mean.

140 Q. I mean to ask you this: What you told the jury a few minutes ago as being what happened is true and is what happened?

A. Yes; when I walked back there and asked what the matter was he got up off the seat box—and what he meant by getting up I don't know, but he said, "I'll show you what is the matter," and when he got up I turned around and walked up the platform, and he sat back down and then he followed me——

Q. In his engine?

A. Yes.

Q. He was sitting in his engine?

A. Yes.

Q. Was it his duty and the rules required that he be flagged before he passed that depot and crossed Main Street?

A. Yes; that is the rule.

Q. And you had gotten on ahead of it farther than the rules would permit?

A. No, sir.

Q. How far are you permitted to go?

A. Did not have a certain distance—spent all my life switching box cars.

Q. About how many feet were you ahead?

A. Ten feet.

Q. Then he stopped the engine?

A. Yes; and why he stopped the engine I don't know.

Q. He could not see you just ten feet ahead of the engine, could he?

A. Could not see me?

Q. If you were just ten feet, he could not see you, could he?

A. Could not see me ten feet—I have stood on the foot board and given signals and they were seen.

141 Q. If you were on the foot board, but if you were on the ground and ten feet ahead, you coulld not be seen, could you?

A. Yes; absolutely.

Q. You would have to be on the engineer's side?

A. I was on the engineer's side.

Q. He did not offer any violence toward you?

A. No; only he got up and said: "I'll show you what is the matter."

Q. And you did not wait for him to show you?

A. I walked back, and he followed.

Q. Did not mention it to you any more?

A. No, sir.

Q. He was not a vicious man; never did show and vicious attempt toward you like he was going to hit you?

A. Several times he did.

Q. Did he hit you?

A. Not yet.

Q. Do you know of him hitting any one else while you worked there?

A. No, sir.

Q. The only thing was your inability to get along with him in reference to rules and no fist fights or any danger of that kind, was it?

A. Will you allow me to explain how I got along with him?

Q. Yes; go ahead.

A. How I got along with him was—to let him do absolutely how he wanted to.

Q. He tried to obey the rules all the time, didn't he—that was his reputation, for being a stickler for the rules?

A. Yes; he observed the rules.

Q. And the only trouble that anyone would ever have with him was in handling the trains in a way he considered a violation of the rules; is not that tru'?

142 A. I never could figure out why he stopped there.

Q. I am asking you another question. I said the only trouble he had with the men was dispute over how he should handle his train, and the only thing was he would curse at you—as customary with railroad people—and that he would go according to the rules; was not that true'?

A. In some cases.

Q. Was not that true in all cases?

A. No, sir.

Q. You say he did not have any fights with the men?

A. I never seen him have any.

Q. If you let him have his way about handling the trains, he would not fuss at all?

A. If you take his cursing and such as that you could get along with him, but a man does not like to let other men curse at them and take everything——

Q. But cursing did not hurt any one?

A. It hurt your feelings.

Q. You never saw him draw a gun on any one and shoot?

A. No, sir.

Q. Did you ever know of him being reported and investigated for anything he did?

A. I know that I was not in the investigation, but I know that he has been talked to and asked to try to get along with the men.

Q. Mr. McGregor was the man in charge of the yards at that time?

A. He was yard master.

Q. And McGregor would be the man the report would be made to and who would have the investigation made?

A. He would report to the train master.

143 Q. And when investigated it would show he was absolutely obeying the rules and in the clear, and the men he would have the fuss with was signalling him and wanting him to disobey the rules?

A. No, sir.

Q. Do you know that is not true?

A. I don't know that it is, and I don't know that it is not.

Mr. E. F. HERRING, witness for the plaintiff, being duly sworn, testified as follows:

Q. What is your name?

A. E. F. Herring.

Q. Where do you live?

A. Near the Woman's College.

Q. In Hattiesburg?

A. Yes, sir.

Q. How long have you lived here?

A. About twelve years.

Q. Did you know Jesse Green in his lifetime?

A. Yes.

Q. Do you know McLendon, did you, before Jesse Green's death?

A. Yes.

Q. What was your occupation before Jesse Green's death and what is it now?

A. I was hostler—the first work I did for the G. & S. I. where they both worked was car repairer, and then I got the job as night hostler——

Q. You worked for the railroad about how long?

A. Eight years.

Q. What do you do now?

A. Furniture business.

Q. Here in Hattiesburg?

A. Yes, sir.

144 Q. What difficulty, if any, do you know of McLendon having before he killed Green?

A. It would take me all day to tell you if I tell all I do know.

Q. Just go ahead and tell——

A. First difficulty we ever had——

Q. You had a difficulty with him yourself?

A. Yes. I was hostler at night and he was running a switch engine in day time but he turned in on my time—I turned in at six and his time I believe would be at 6.50 and that throwed me to catch

his engine; and the contract was that engineers after coming in on their runs after they put the train away would come to the shops where they would wash up and go home, and McLendon had made it a rule when he was switching the shop track—they would have to get a pretty good cut of cars out of there and would gather them all up and carry them up to the yard about a quarter from the shops back toward town and he had the habit of getting the hostler to ride on the engine with him and when I went down there I didn't like that and——

Q. Was it right or wrong for him to do that?

A. Not right.

Q. Go ahead——

A. His contract was——

Q. Go ahead and tell about your row.

A. He sent for me and I would not go; I told the fireman if he was through work I was ready to go with him because I did not have time to ride around and I sent the fireman back; the negro said, "You had better come on"——

(Objection and move to exclude this conversation.)

Q. Go ahead and tell about your fuss?

A. You would have to tell the whole thing to show you where we disagreed.

Q. Did you have a disagreement?

A. Yes.

Q. What was the results of that disagreement?

145 A. He come to the shops and hollered for me and I took my time walking over there; he was sore as he could be. "Come on, come on," and said, "I'm going to see if I can't find out if you won't relieve me." I said, "How long have you been here?" "You will find out how long I have been here," he went on to say what he would do and said he would write me up and if that did not do any good I——— would find out why I did not relieve him. When he come up I walked straight across there—I was on the coal hoist—I could see nothing for him to get sore at me for—he went on and it resulted in a fuss, curse words, and when he started to get off his engine he kept on growling all the way to town and when he got off he was so hot he could not make out his ——— ticket.

Q. What do you mean by being hot?

A. Mad and furious, like he could eat me up.

Q. How long did that disposition continue toward you?

A. I can't say exactly but it was two or three months that he did not speak to me.

Q. How long was that before Green was killed?

A. That was about seven years before he was killed.

Q. He was killed in 1918?

A. Yes.

Q. What year did you work there?

A. Went to work there in 1910.

Q. When did you quit?

A. 1917.

Q. State what other difficulty he had with other people?

A. I never did see him have any row; would be jawing about others every time he would pass the shops after he got in a good humor with me.

Q. What other cases do you mean?

A. He would tell me about the switchmen and the rows they
146 would have; some new switchmen would come on and would not flag the crossing, and he would stop and the switchmen asked what was the matter—and when there would not be but one switchman on there, said he ought to have sense enough to know what to do——

Q. During all the time you worked there do you know anyone that he worked with that he got along with?

A. Never heard of a man that ever got along with him without having a fuss.

Q. Did you know of them having him up before the officials of the railroad about his conduct?

A. It seems to me they had him up a time or two; I know he has been reported a number of times for different contrary things he would do.

Q. What would be the nature of those things?

A. One time I was going from up town to the South yards, and after I got around the bend where I would see the South yard I saw a switch engine, and I thought I could beat it to the brick yard, and I tried to go on down; I knew I had plenty of time—I saw him trying to beat me to the switch, and I asked one of the switchmen to ask him to back up. He said, "No; I am not going to say anything to him—you ask him." I said I would rather go back to town.

(Objections sustained and all that he said since he told about the last difficulty be excluded. Exceptions.

We here desire to ask the witness a question about his general reputation for peace and violence in the community where he lived.

Which is objected to, and the court sustains the objection for the reason already given. Exceptions.)

Cross-examination:

Q. Your name is Herring?

A. Yes.

Q. You have no personal feeling against McLendon now, have you?

A. No, sir; I can always forgive a man.

147 Q. Have you freely forgiven McLendon?

A. As long as he is out of my sight I try to pass oi a thing; I don't care anything about him.

Q. The only difficulty you had with him was the day you have told us about?

A. I have had two or three; he has turned me in two or three times.

Q. I believe he was investigated, and the trouble he would have would be with men because they would not flag the crossing as he thought they would do, and said they ought to have sense enough to know?

A. That was in some cases.

Q. You say that after you had this difficulty with him there was no act of violence when you would not go with him on his engine, just a little word play?

A. I don't know what all he would say.

Q. It was just word play?

A. Yes.

Q. Beyond the fact that you still hold feelings you have no desire to do him injustice or wrong?

A. No, sir.

Q. Then I repeat the question, When you had the trouble with him all that happened was hot words between you and him?

A. If he could have done anything while——

Q. I am asking you what was done; you have no objections to telling that?

A. That was all that was done.

Q. Then for a little while you did not—he did not speak to you, and then when he did start to speaking to you he got exceedingly friendly. Is that correct?

A. Yes.

Q. And then he wanted you to take sides with him about difficulties with the switchmen—they would not signal him right and flag the crossing. Is that correct?

148 A. Yes, sir; he would talk about that and other things.

Q. Is it not a fact that because of McLendon being such a stickler for the rules and requiring the switchmen to flag all the crossings and to flag ahead that it made it a little hard for the switchmen, than they felt like they should be required to do, and for that reason they were always trying to get something on him?

A. No, sir; they have had plenty of stuff on him to get him run away and no one seemed to have the nerve to do it.

Q. No one reported him?

A. No, sir; they were afraid to do it.

Q. Co the company would not know about those things?

A. Yes; they would tell the yardmaster.

Q. Would not that be reporting him,

A. No, sir; not like he would report you.

Q. The way to report a man would be to write him up,

A. Yes.

Q. Now, to mention the matter to the yardmaster was not reporting him?

A. No, sir; to where it would take any effect, because the yardmaster would try to keep everything away from the officials.

Q. To what official would you have to report to take effect?

A. To the superintendent and master mechanic.

Q. McGregor would report to the master mechanic and the conductors would report to the superintendent?

A. Trainmaster or superintendent.

Q. And unless these reports were made no notice was brought to the company where action could be taken?

A. That is the way they would throw you off.

149 Q. You know all—you all knew that?

A. Sure.

Q. That was the custom?

A. They would promise to stop it and say, "I am going to attend to it."

Q. Notwithstanding the enmity you hold toward McLendon, still, you would not do him an injustice; he was fussy but not dangerous. You did not see him knock anyone in the head, did you?

A. Never saw it, but heard.

Q. You worked there six or seven years and did not——

A. No.

Q. You never saw him shoot or heard of him shooting anyone?

A. Yes; I heard of him killing a man.

Q. Not during those six or seven years?

A. Yes.

Q. This man was a brother-in-law, for which a jury said he was justifiable and acquitted him?

A. Yes.

Redirect examination:

Q. Mr. Cassidy asked you if McLendon was a dangerous man; did you answer that?

A. I don't remember the question.

Q. What di' you say about that?

A. I don't know what you would call a dangerous man if he was not dangerous.

Recross-examination:

Q. In what manner was he dangerous; you say in the seven or eight years you never knew of him hurting anyone?

A. If people gave way to him, if you stacked up like he did you would have to kill him.

Q. You don't know what he would do?

A. I will admit I have taken things from time to time.

150 Q. You don't know what he would do?

A. No.

Q. You know Hollifield?

A. Yes.

Q. Say you stood there rowing with a man and the man said, "I'll make you eat the gun"; what would you do?

A. I never heard of a case like that.
Q. And all you knew of him doing was his fussing?
A. Yes.
Q. And you don't know what he would stir up if the man called his hand?
A. Yes; he was the kind of fellow if he ever got anything against you——
Q. I am asking you if know if it had been put square up to him whether he would fight?
A. I tell you one thing why the people did not close in on him.
Q. Answer my question. Do you know what he would do?
A. No answer.
The COURT. Do you know or not?
A. Yes; I know what he would do.
Q. What instance?
A. He would fight you.
Q. Do you know of him fighting anyone?
A. They have told me of it.
Q. I am asking you what you know of your own knowledge?
A. I was afraid of him because he had a gun.
Q. You are afraid of any man that has a gun, are you not?
A. Yes. He took it off his engine every evening.
Q. How many engineers you know of that do not carry a gun?
A. Most of them do.
151 Q. How many conductors that you know of that do not carry a gun?
A. Lots that do and lots that don't.

Redirect examination:

Q. Carry guns to shoot each other with?
A. More for protection than anything else.
Q. Engineers have no more right to carry guns than you have, have they?
(Objections; sustained.)

Mr. GODWIN, witness for plaintiff, being reintroduced, testified as follows:

Q. You were on the stand yesterday in this case?
A. Yes.
Q. Will you please tell the court and jury what acts of violence or personal difficulty that you know of McLendon getting into?
A. Do you mean to go ahead and detail?
Q. Just as short as you can, to get to the point, if you had these difficulties?
A. About this day at the tool house he made a false report for a derail at the switch in the north yard.
Q. You mean you had a difficulty with him about it?
A. No, sir; about the Negro in regard to this report.
Q. What trouble do you refer to?

A. He asked me did I make the report and I told him I did not find anything to make a report for in regard to running through the switch, and——

Q. Tell what you did?

A. I said I had had the track walked and inspected it by the Negro and I also inspected it and I found nothing wrong—and he said to the Negro that he would not tell him so "or I'll brain you with my hammer," and I——

152 Q. Did he brain him with his hammer?

A. No.

Q. How come him not to?

A. I got in between them and told him not to—the Negro had not done anything—and he said, "All right, I'll see you later."

Q. What other difficulties, if you know of any others he had with his coemployees?

A. I did not see them; I heard of them.

(Objections.)

Q. Just tell what you know.

A. That, as far as I know, I have seen him with a gun time and again—in fact, he had a hammer in his right hand at the time.

Q. In the handling of his engine you know of him trying to harm anyone with his engine?

(Objection; sustained.)

Q. How did he handle his engine with reference to the safety of people?

A. It was rather dangerous to be anywhere around——

Q. In what way?

A. Run over you if you did not get off the track.

Q. Did you see him make any effort to injure anyone?

A. If I had not gotten out the way he would have hurt me and my——

Q. With reference to Green, for instance?

A. I saw him try to catch Mr. Green twice between the cars.

Q. What do you mean by catch?

A. Catch him between the coupling—man be standing between two cars and would go to another car.

(Objection and move to exclude for the reason that it is not competent to the issue joined here. Sustained and let what he said about the cars be excluded.)

153 Cross-examination:

Q. This Negro was your trackwalker?

A. Yes.

Q. He was the Negro that reported he did not find anything, and said McLendon had made a false report?

A. I said McLendon had made a false report; I had a circular from G——— that McLendon had made the report of this derailment splitting the switch—I knew nothing of it—and in about 10 days I gets a circular from G——— to make a report on the car

inspection—I generally make the inspection, and I asked the Negro if he knew anything about it.

Q. As I understand you, you sent this Negro over the track and you made the report that you saw nothing wrong?

A. No defect at all.

Q. So, then, it stood before the company as either McLendon had made a false report or this Negro's report was error?

A. I also made an inspection.

Q. Answer the question yes or no. It stood that way, did it not? You say you told McLendon that you sent the trackwalker over it and you did not find anything?

A. Yes.

Q. And McLendon picked up his hammer and said, "He can't tell me it is or I'll brain him."

A. I told you that the Negro went over and that I went over there and——

Q. You said on direct examination that you told McLendon that you sent the trackwalker over and he said he did not find anything wrong?

A. Yes.

Q. And that McLendon reached for his hammer and said, "You can't tell me that, I'll brain you"?

A. Yes; and I stopped him.

Q. He a white man?

A. Yes.

154 Q. And he would not let a Negro say he would lie about anything?

(Objection. Sustained.)

Q. That was the only difficulty that ever came under your observation?

A. Only time I saw him——

Q. You say he had a pistol, but did not make an effort to pull it?

A. No, sir; but that was not the first time I saw the pistol.

Q. How long did you say you worked there?

A. 7th day of January, 1914, and worked to January, 1916.

Q. Two years?

A. Not quite two years.

Q. Almost two years?

A. Yes.

Judgment of conviction of McLendon is introduced by consent and read to the jury, on page 606, book 5.

Plaintiff rested.

Comes the defendant and moves the court to exclude all the testimony offered on the part of the plaintiff and grant a peremptory instruction for the reason:

1st. That the plaintiff has failed to make out a case as should be submitted to the jury.

2nd. That there is not sufficient facts to show that the defendant is guilty of negligence in any respect.

Overruled; exceptions.

Mr. G. W. Dawson, witness for the defendant, first being duly sworn, testified as follows:

Q. What is your name?

A. G. W. Dawson.

Q. Where do you live?

A. Gulfport.

Q. Where did you live during the year 1918 and some years prior to that date?

155 A. Left Gulfport November, 1917; previous to that time, between 1914 and 1917, I was in Hattiesburg.

Q. Between 1914 and 1917 you were at Hattiesburg?

A. Yes.

Q. You went to Gulfport in 1917?

A. Yes; November.

Q. What occupation were you engaged in while in Hattiesburg?

A. Agent for the G. & S. I. R. R.

Q. As agent for the G. & S. I. R. R. Co. did you know Engineer Zack McLendon?

Q. I did.

Q. Where did he work at that time and what were his duties?

A. Switch engineer for the G. & S. I. R. R.

Q. State at what point.

A. Hattiesburg.

Q. What run did he have with respect to the day or night run?

A. Day run.

Q. Did you know Jesse Green in his lifetime?

A. I knew Mr. Green.

Q. What was his occupation?

A. Engine foreman.

Q. Where was he working when you first came to Hattiesburg?

A. At Hattiesburg, as engine foreman.

Q. What run did he have as engine foreman?

A. Day run.

Q. When you came here?

A. Yes.

Q. What were the duties of the engine foreman on the day run with the switching crew in the city of Hattiesburg?

A. The foreman's duty was about the same thing as the conductor running the train; the engine crew was under his charge.

156 Q. With respect to the engineer—who was in charge, the engine foreman or the engineer, and which was superior and gave instructions, orders, and signals to the other?

A. Of course, you might say in doing their line of work the engine foreman was the man that gave the instructions as to the work to be done; the only thing the engineer has to do was to run his engine

and follow instructions—signals, you might say, given him in handling his engine.

Q. Who was Greene's engineer on the day run when you came to Hattiesburg?

A. Best I can remember, McLendon was the engineer.

Q. How long did Green and McLendon continue to work in their respective relations of engineer and engine foreman on the day run in the switching yards of Hattiesburg after you came here?

A. They were in continuous service.

Q. I mean together.

A. They worked together from the time I came here in March, 1914, up until just previous to our first railroad strike that we had in April or May, 1916—that is, about two years.

Q. Did they work together after that time—I mean after April, 1916?

A. Let me go back to that statement I have just made. Just previous to the trainmen's strike—I don't remember the date of the exact month—but just previous to the strike Mr. Green came to me and asked to be changed to the night run.

Q. Did he state any reason why he wanted to be changed to the night run?

A. I don't particularly remember right now whether he gave a specific reason, but I believe he did mention something about—I don't remember about that.

Q. Was he changed to the night run?

157 A. Yes. I told him that De Witt was the night engine foreman and while he was an older man than De Witt that if it was agreeable to De Witt I would be glad to make the change.

Q. Could you have made the change over De Witt's objection?

A. No, sir.

Q. Why could you not, Mr. Dawson?

(Objections.)

The jury is here retired.

Q. Why could you not?

A. The first place, Mr. De Witt—I found these men placed in these positions when I came here—you might say the day run was always preferable to some and the night run preferable to others, and I did not feel in justice to make the change unless it was agreeable with De Witt.

Q. I will ask you if there was a contract between the railroad company and the trainmen with respect to the position they would hold and the men who would have the choice of those positions and if you had knowledge of that contract?

A. At the time that change was made I don't think the trainmen had a contract with the G. & S. I. R. R.

Q. Would you know the contract if you were to see it?

A. No, sir.

Q. If they did have a contract at the time, you did not know it?

A. No, sir. I feel sure, though, that the trainmen at the time the change was made did not have a contract, and this contract was, you might say, when that first trainmen's strike came off; that was brought about for an increase in pay and in recognition of the union——

158 My purpose in this was to show that the rule of seniority prevailed, which the witness' answer shows did not exist at the time.

Q. Mr. Dawson, you say that Green was put on the night run?

A. Yes.

Q. How long did he remain on the night run?

A. Until after the strike was won—may be one month or six weeks. After the train men had won the strike and the union recognized and then a contract, Mr. Green came to me and demanded that he be placed back on the day run, that he was entitled to it.

Q. Go ahead and detail what he said.

A. I said, "Inasmuch as this change was made at your suggestion to go from the day run to the night run, if it is agreeably arranged between you and De Witt to make the change, and in justice to De Witt in making the change back from the day run now to the night run, I think it will be well that you arrange the matter between yourselves, which will be satisfactory to me to change you back on the day run." At first Mr. De Witt, the best I remember, hesitated a few days in giving up to make the change—while I had not seen this contract but talked to McGregor—one of the conductors had mentioned the fact to him and he told me that Green's seniority entitled him to the day run; and in a few days after that De Witt come to me and said the matter had been straightend up between him and Green, and that he would make the change.

Q. Did Green mention about any difficulty he had between him and McLendon at the time he was wanting to be changed?

A. No, sir; not as I remember—no mention made of McLendon at that particular time.

(Objection; overruled; exceptions.)

159 We object to the introduction of this testimony with reference to a contract with the union—the Railroad Trainmen or Order of Engineers—on the ground that no copy of said contract was filed with the pleadings, and on the ground that there is nothing in the evidence to show that the defendant, Jesse Green, was in any way bound by said contract; and further, on the ground that the contract between the G. & S. I. R. R. Co. and its servants could not and ought not to suspend the law requiring the G. & S. I. R. R. Co. to furnish to its servant, Jesse Green, a reasonable safe place in which to work, including fellow servants. And on the ground that if said contract by any of its terms undertook to relieve the railroad company from the duty or obligation that it owed to Jesse Green by law that such contract for that reason would be void as against public policy; and for the reason that any contract, whether made or entered into by Jesse Green, deceased, or not, or his other fellow

workmen or not. And on the ground that the G. & S. I. R. R. Company could not even enter in a contract with Jesse Green which would relieve it from the legal duty of furnishing to Jesse Green and his fellow servants a reasonable safe fellow employee.

The COURT. The objection made by the plaintiff as to the introduction of contract is overruled, and permit the defendant to introduce contract.

Counsel here introduces the original contract.

The jury is here returned and the following testimony taken.

Q. Mr. Dawson, you stated that you were in doubt whether, or rather that you did not desire and could not give Mr. Green the night run over Mr. De Witt; will you explain to the jury why you felt that way and instructed Mr. Green to see Mr. De Witt and make the matter satisfactory with him?

160 A. As I stated before, that at that time there was no contract in force or seniority clause giving the older men preference and Mr. Green came to me and asked to be changed to the night run; and in order to do justice to Mr. De Witt, who was the night man, I instructed Mr. Green to see Mr. De Witt and make the arrangement between them—that if it was satisfactory to De Witt to take the day run it would be satisfactory to me.

Q. Was that arrangement made?

A. Yes.

Q. Then what run did Green take?

A. A few days after that De Witt went on the day run and Green took the night run.

Q. Who was on the day run as engineer after the change of conductors?

A. McLendon.

Q. And who was the engineer on the night run?

A. One or two different engineers on the night run, but Williams at that time.

Q. A. P. Williams?

A. I don't know his initials, but I think he was the night engineer.

Q. How long did that association of the switching crew continue, if you know?

A. I think Green staid on the night run—as stated before previous to the change was made a little while before the trainmen struck which was—as well as I remember in March; and after the strike, which was won by the trainmen, they obtained a schedule and contract from the railroad company, and in that contract, as I understand, the seniority clause was stipulated; and as well as I remember the day run paid a little more than the night run (will not be sure about that) but after this strike—I don't remember how long, but probably a month or six weeks—Mr. Green come to me and demanded that he be put back on the day run.

161 Q. Who was engineer on the day run when he made that demand?

A. McLendon.

Q. Did Green know who the engineer was?

A. Yes.

Q. Did you immediately accede to his demand in placing him on the day run?

A. Not right at the time.

(Defendant renews objections; overruled.)

Q. I will ask you to read from the contract made between the railroad company and the conductors, trainmen, and yardmen as of June 20th, 1917, Article 15, subdivisions A, B, & D.

A. "In filling positions and in the promotion of men, seniority shall govern, if competent.

"(b) Seniority rights of conductors, flagmen, brakemen, and yardmen will commence with first trip made or day's work performed.

"(d) In yard service, day positions will be considered preference over night positions."

Q. Now, under these rules and stipulations of this contract which was the preferable position, the day or night position?

A. The day run was the preferable position.

Q. Then the man who having seniority and showing would have what right?

A. According to the contract signed by the company that would entitle him to the day run.

Q. Then Green under his seniority demanded of you that he be given the day run?

A. Yes.

Q. You say you did not accede to his request to be given his right of seniority at first; did he procure the service of any
162 official, or any other person to talk to you and explain the contract to you?

A. As I stated, when Mr. Green asked to go back on the night run, while I did not know what this contract was at the time, I told Mr. Green to see Mr. De Witt and make the change back agreeable and Mr. De Witt kinder hesitated to make the change, but in a few days after I saw Mr. McGregor, who is the representative of the conductors, and he informed me——

(Object to the conversation or acts between this witness and McGregor; sustained.)

Q. Did a representative of the conductors speak to you in the interest of Mr. Green in his demand for recognition of his seniority in asking to be returned to the day run?

(Objection; overruled; exceptions.)

Q. Who was the man?

A. Mr. McGregor.

Q. Did you know what position McGregor held with reference to the Order of Railway Conductors?

A. I knew that McGregor was representative of the O. R. C.

Q. What was done then with reference to Green's demand that he be given the day run in recognition of his rights under the seniority rules of the contract?

A. Placed back on the day run.

Q. When he was placed back on the day run with whom was he thrown in contact with and with whom would he work?

A. McLendon.

Q. Just about what time of the year and what year did that happen that this change of Green back to the day run was made?

A. As I stated, I don't remember exactly, but it was after the trainmen's strike and this contract was made recognizing the union. In fact you might see the contract; you might say it was a
163 month or six weeks—may be a little bit longer—between March and June.

Q. This contract was made in June 20, 191', it was before the contract was drawn or after it was drawn?

A. I think it was after the contract was drawn; that was when McGregor mentioned about them having the seniority rule.

Q. It was in the middle of the year 191'?

A. Yes.

Q. How long did Green continue to work as switching foreman with McLendon as engineer, so far as you have a personal knowledge?

A. He was working with him up until I left Gulfport November 1st, 1917; that was about fifteen months.

Q. You had personal knowledge of him working in that position fifteen months?

A. Yes.

Q. When you left Gulfport could you state whether or *they* they were still working together?

A. Yes; when I left Gulfport.

Q. Who succeeded you as agent at Hattiesburg?

A. C. T. Singleton.

Q. How long did he remain?

A. Only about six or seven months, I think, but Mr. Singleton did not have charge of the yard.

Q. Who had charge of the yard after you left?

A. I think John Stevens was made yardmaster.

Q. Did Md. Godwin ever report McLendon to you for failure to discharge his duty or for the improper discharge of his duty?

A. I don't remember ever having such a conversation.

Q. Did Godwin ever make any complaint to you at all?

A. I can't recall of any complaint ever made by Godwin.

164 Cross-examination:

Q. Are you in the service of the company now?

A. Yes.

Q. In a position higher than the one you occupied at the time you testify about?

A. About the same position.

Q. Jesse Green had no power or authority to speak of controlling any of his fellow servants, did he?

A. No, sir.

Q. Green was one among a number of men that were working under your instructions at the time you testify?

A. Yes.

Q. Green, you say, according to this contract, had a right to work during the day?

A. Yes.

Q. He had a right to ask the company to put him on the day shift?

A. When he was on the day run there was no contract and was no contract made at the time the change was made.

Q. You say to the jury at the time when Jesse Green asked you to be put on the day shift he had a right to that job?

A. Yes.

Q. Then he was within his rights with the company when he asked the company to put him on the day job?

A. Yes; his seniority right.

Q. Then, if you assume that Jesse Green had a right to presume that none except safe fellow employees would be selected by the company to work with him on this day job, there would be no danger of his taking the day job, would there?

A. I don't know that that matter was thought about—looking at it from that standpoint.

Q. If we assume that if McLendon was a dangerous man; if
165 we assume also that Jesse Green had a right to be put on the day job; if we assume it was the duty of the railroad company to discharge McLendon because he was a dangerous man, then Jesse Green would have a cause or right to demand that discharge, would he not—in other words, he would have a right to the day job?

A. Yes; I presume if a man was a bad man or of immoral character—if it could be proven on him—I presume the railroad would take him from the service.

Q. It was not the rule of the railroad that Green had to stay on the night run, because he had a right to the day run, on account of having an unsafe fellow employee?

A. Mr. Green had a right to the night run or had a right to the day run—his seniority gave him the right.

Q. And whether he had either run he had a right to——

(Objection; sustained.)

Q. I will ask you if it was not provided within the rules of the company—No. 226—"that employees who are dishonest, immoral, quarrelsome, or otherwise vicious will not be retained in the service"? That is the rule of the company, is it not?

A. I don't remember.

Q. I will hand you the book——

A. That seems to be the rule.

Q. Now, every employee of the company had a right to presume that the company would obey that rule?

(Objection, for the reason that the Book of Rules had been produced and shows that in so far as it may be protected that it was superseded by the contract under which the trainmen and conductors and engineers were working. Overruled; exceptions.)

Q. If rule 226 was not in force—was rule 226 not in force at the time when Jesse Green was killed?

A. Yes.

166 A. Yes.

Q. I will ask you if under rule 226 if any employee of the railroad did not expect the company would obey rule 226?

A. Yes.

Q. And it provided in rule 226 "that employees who are dishonest, immoral, quarrelsome, or otherwise vicious shall be discharged"?

A. Yes; that is what the rule said.

Q. I will ask you if for any reason that Jesse Green did not desire or was afraid to associate with McLendon—if we assume that McLendon was such a man—then he would be held by the company back on the night position from the day position, because the company was not obeying rule 226?

A. I might answer that question by saying in this case Mr. Green never complained to me that McLendon was a vicious man.

Q. Then, if Mr. Green would not promote himself by going to the day position because of the fact that McLendon was a vicious man and was not discharged by the company—then he would be held back by the company in not obeying rule 226? Is that right?

A. Yes.

Q. Now, then, if McLendon was a vicious man and came within the conditions of this rule and all the rules of the company, then Green had a right to the day position?

A. His seniority gave him the right.

Q. *Ut* that gave him the right for McLendon to be discharged, even by reason of his advancement, that made it necessary for McLendon to be discharged?

A. Provided the company seen fit.

Q. I said provided he was such a vicious man as prevails in rule 226, even then Green had a right to come forward—even if it

167 became necessary to discharge McLendon—that is right, is it not?

A. Yes.

Q. Returning to the contract that counsel referred to, article 19, saying that the trainmen, yardmen, will not be discharged except for just cause—in such case will be given a hearing in five days unless under this contract you talk about—the company reserved the right to discharge men for just causes, did they not?

A. According to the rule, that is right.

Q. Then if the company had a right to discharge McLendon for just cause, is not the rule in 226 one of the causes for which you have to discharge men who are quarrelsome, immoral, and otherwise vicious?

A. I presume so.

Q. Then, if there is nothing in this contract and nothing in the rule of the company from preventing the company from discharging McLendon if he was such a man?

A. Yes.

Q. The company had a right if he was such a man?

A. If he was such a vicious and bad character.

Q. And if he was such a man, you admit it was the duty of the company, under these rules and this contract, to discharge him?

(Objections; sustained because it is a question of fact.)

Q. You say Stevens was yard foreman at the time?

A. Yardmaster, after I went to Gulfport.

Q. As yardmaster, under the rules of the company, he had supervision under rule 582?

A. Yes.

Q. He, then, had charge of Green, McLendon, and other men working on the yard?

168 A. He had immediate charge of the engineer, foreman, and his helper; of course, when it come to firing the engineer he could only make recommendations.

Q. McLendon was one of the men employed?

A. Yes; but the yardmaster could not dismiss an engineer.

Q. I am not asking you if he could dismiss him; I am asking you if he had charge of him.

A. Yes.

Q. He was the servant of the company selected for the purpose of bossing the yard?

A. Yes.

Q. If it became necessary for the company's interest for notice to be served on any employee of the company having jurisdiction over the yard as to any material point, he was the proper person to serve notice on?

A. Yes.

Q. Have you seen him here to-day?

A. Yes.

Q. He is here at the courthouse now?

A. I don't know.

Q. He is working for the company?

A. Yes.

Q. In the city of Hattiesburg?

A. Yes.

Q. And in reach of the court here if he should be desired?

A. Yes.

Q. He is the person in charge of the yard, who is the proper person to summons for information of material notice governing the company's interest so far as the yard is concerned?

A. Yes.

Q. And that included all the men—included McLendon?

A. Yes.

Q. And he was yardmaster at the time Green was killed?

A. I was not in Hattiesburg at the time.

169 Redirect examination:

Q. You were asked about whether or not Green had a right to demand his day position, even though that required McLendon to be discharged; do you know anything about whether McLendon as engineer could be discharged without good cause shown?

A. No; absolutely no.

Q. You say you had been yardmaster from the time Green was put back on the day run until you left the service, which was about two and a half years?

A. Yes.

Q. You then were the proper person to whom the complaint be made by Green if McLendon was not the proper engineer to work with?

A. Yes.

Q. Was such complaint made to you by Green that McLendon was not safe man to work with?

A. No, sir; never had that kind of complaint.

Q. Tell what kind of complaints were made, if any were made?

A. I had some complaint from Green in regard to the work; it seemed that McLendon did not handle the engine fast enough; did not run as fast as he thought the engine should run; and invariable, as I remember, upon investigation I always found that McLendon was simply operating by the Book of Rules.

Q. Could you make a recommendation that he be discharged upon the complaints that were made and upon the acts committed?

A. No, sir; could not—as I said, we never had a justifiable complaint.

Q. Now, did you have the power to hire or discharge the switching foreman, Mr. Green?

A. Yes.

170 Q. Did you have the power or authority to hire or discharge the engineer?

A. No, sir.

Q. Did Mr. Stevens have the power or authority to hire or discharge the engineer working with the switching crew?

A. No, sir.

Recross-examination:

Q. Had authority to recommend it, did he not?

A. Yes.

Q. And that recommendation is usually followed?

A. That is the course.

Q. You say you had received complaints about McLendon?

A. Yes, sir.

Q. I judge from what you say you received a number from Green?

A. Yes; some complaint in regard to McLendon's work.

Q. Did I understand you to say you had received a number of complaints from Jesse Green?

A. Yes; in regard to his work.

Q. All the complaints of Green were covering the engineer's fitness as engineer?

A. In regard to his handling of the engine.

Q. That is, fitness as engineer?

By Mr. WILLS. I submit the witness is answering the question correctly.

Mr. CASSIDY. Q. That is, fitness as an engineer?

A. I don't know that you would call it fitness.

Q. Did you confine your investigation and supervision of McLendon to the complaints you heard?

A. I investigated, and after the investigation they were such a matter that I did not think that Green had any complaint.

Q. The only thing you did was to investigate complaints you received?

A. Yes.

171 Q. You yourself did nothing except as you had a complaint before you?

A. That is all.

Q. What office did you hold with reference to this yard?

A. Agent with the supervision of the yard.

Q. And you instituted no means of finding out for yourself independent of complaints as to what kind of character McLendon was?

A. No, sir; never had any occasion to go that far.

Q. Did you consider that was not your duty?

A. As I said, I never had complaint in such a matter.

Q. Just answer the question—did you consider that not your duty?

(Objection, for the reason that a suitable and fit engineer had been employed; that the company had a right to presume him to remain such until notice was brought to the contrary. Overruled; exceptions.)

Q. I understand you to say that you did not consider that your duty; is that right?

A. I would consider it my duty if the complaint was strong enough.

Q. I asked you, first, if you made any investigation at all except as you received complaint.

A. That is all.

Q. Then I asked you if you considered it your duty not to institute any separate independent investigation except as connected with some complaint filed?

A. I did not in this case.

Q. You did not consider it your duty, did you?

A. Not upon the information I had.

Q. Independent of any complaints that were pending before you, did you institute any means yourself personally to find out what kind of a character McLendon was?

172 A. No, sir.

Q. You did not consider it your duty to do so, did you?

A. No, sir.

Q. In other words, you considered your duty fully performed when you acted on any complaint laid before you?

A. Yes.

Q. Was any other official of the company selected for the purpose of having such investigation made independent of the complaints made?

A. Those complaints, of course, come through——

Q. I am not asking you about the complaints. Is there any other official of the company whose business it is to see as to the fitness of the men outside of those who receive complaints; in other words, did your company provide for any supervision of the fitness of men outside of receiving complaints?

(Objections; overruled; exceptions.)

The COURT. Do you understand the question?

A. I understood it; would like to answer in my own way. Take my position as supervisor of the yard, if I had a complaint——

Q. I did not ask you of a complaint; I said, Is there any other official other than yourself whose business it is, independent of complaints, to make their own personal, independent investigations as to the fitness of the men?

A. I don't know of any.

Q. Do I understand you to mean that in so far as the supervision of the fitness of employes are concerned the company adopts the policy of confining itself to the complaints preferred before the proper officials?

A. These complaints are.

Q. Did you confine it to that?

173 A. They are put before higger officials for their further investigation.

Q. Did you confine it to that?

A. Yes.

Q. Then the company conducts no investigation into the character of its employees unless some one has preferred a charge against him?

A. That is the way I understand it; they would not make an investigation of the man unless charges preferred against him.

Q. Did you receive any complaint of McLendon from other persons other than Green?

A. I don't remember of any. Can't recall.

Q. Did your office keep a record of the complaints filed?

A. No.

Q. Can you give an idea of about how many men were working on the G. & S. I. R. R. at the time of the injury?

A. You mean the total number?

Q. Yes; about how many?

A. No; I can't.

Q. Can you give me an idea about how many employed?

A. I really could not.
Q. Was it a large number?
A. Quite a large number of men and women.
Q. Was there a large number employed here in the city?
A. Quite a good number.

Redirect examination:

Q. How many employees worked in the yard on the day run at the time that McLendon and Green worked there who were fellow employees of these gentlemen; about how many—your best judgment?
A. Five men to the engine; that was engineer, fireman, two switchmen, and switching foreman.
Q. How many engines working during the day?
174 A. One.
Q. So there would be five men working in the yard as the fellow employees of McLendon when he would be in the service, is that correct?
A. Yes, sir.

Mr. H. E. McGregor, witness for the defendant, being first duly sworn, testified as follows:

Q. Your initials are H. E.?
A. Yes.
Q. What is your occupation?
A. Railroad conductor.
Q. How long have you been conductor?
A. Seven years.
Q. Did you know McLendon?
A. Yes.
Q. How long?
A. About nine years.
Q. Did you know Jesse Green in his lifetime?
A. Yes; very well.
Q. How long had you known Green prior to his death?
A. I suppose seven years.
Q. What position did you hold with respect to the Order of E- R. Conductors in the year 1916?
A. General chairman.
Q. Have you held that position since 191'?
A. I have.
Q. Who is the chairman now?
A. I am.
Q. As chairman of the Order of Railway Conductors on the G. & S. I. R. R. what power or authority did you have to speak for the order?
(Objections.)
Q. Did you have authority to contract with the railroad company in behalf of the Order of R. R. Conductors?

175 A. Yes.

Q. Did you in 1916 on behalf of the railway conductors enter into a contract with the G. & S. I. R. R. Co.?

A. Yes.

Q. I will ask you to examine this instrument I hand you and state what it is.

A. That is a copy of the original agreement before it was put into book form; signed up by the general superintendent, myself, and Mr. Wheelis.

Q. You say it is a copy; who signed the signatures that are to the agreement you have before you?

A. The superintendent for the railroad and McGregor for the conductors.

Q. Is that your signature?

A. Yes.

Q. Is that the instrument you signed?

A. Yes, sir.

Q. Who else signed it?

A. Z. S. Wheelis, general chairman for the B. R. T.

Q. Who was bound by that contract, Mr. McGregor?

(Objections; overruled; exceptions.)

A. Parties to the contract was the company and the employees.

Q. Was Mr. Green an em?pl'yee and a member of the organization represented in the execution of that contract?

A. He was.

Q. What organization was he connected with?

A. B. R. T.

Q. I will ask you if Mr. Green requested your services in obtaining his rights under that contract with regard to the seniority rule in securing a run—either day or night, in the yards of Hattiesburg during the year 1916?

I would not be positive whether it was near the close of the year or the first of 1917, but about the time he did.

176 Q. What did he say to you, and state what happened between you and Green with regard to this request he made of you?

A. He met me several times when I was passing in Hattiesburg and said that Mr. Dawson——

Q. The gentleman who has just testified?

A. Yes; G. F. Dawson. Said that Dawson would not give him his rights on the day job and he was entitled to it according to the seniority clause in the contract, and he said, "I would like for you to talk to Dawson, who is a friend of yours, and see what you can do"; and "I am entitled to it and I want it"; said he had worked at night quite a lot and wanted to demand his right on the ground that he was entitled to it. I told him yes; he was. I did not say anything to Dawson for quite a while and he come to me again, and the second time I spoke to Dawson about it. Mr. Green come to me three or four times. I was down here on some committee work

for the company and went to Dawson's office and he told me the conditions and he said, "What can I do?" I said, "Nothing to do except give this man his right; you will be compelled to unless you can show a mighty good cause why; you know the contract calls for it, and I don't think you treat Mr. Green right——

(Objection.)

By the COURT: I don't think this is competent.

Mr. WILLS. We offer it because Mr. McGregor was speaking for Mr. Green at the time.

(Objection sustained and exclude what he said occurred between him and Dawson other than the request that Mr. Green be given his rights as provided in the contract, to which ruling of the court the defendant excepts.)

Q. Under the terms and conditions of that contract was the company permitted to discharge a man from its service without good cause shown; refer to the contract if you don't know?

177 A. I know it provided for that.

Q. I will ask you if the engineers had a separate contract with the railroad company?

A. Yes.

Q. Are you acquainted with and know the conditions and terms of that contract with respect to the discharge of men and the rule of seniority?

A. Offhand I could not quote it.

The COURT. I will let you state that you know it, but will not let you tell it, because it is the best evidence itself.

Plaintiff allows you to read the contract.

"ARTICLE 13.

"No engineer will be discharged or suspended without sufficient cause. In case an engineer is taken off, he will be given a thorough investigation and a decision within four days. He may have another engineer of his own selection to appear with him and speak for him. He will have the right to appeal from local to the general officers of the road and will have a decision from the latter within ten days after presenting his appeal, which decision will be final. In case such decision is not made within ten days, his pay will begin and continue until a decision is rendered, and if suspension or discharge is unjust, he will be reinstated and paid for all time lost. All investigations pertaining to the breakage to engines to be conducted by the supt. motive power or his representative."

Q. Now did the contract contain a clause with regard to the seniority right; and if so, will you read it?

A. This contract?

Q. Yes; the engineer's contract.

"ARTICLE 15.

"The oldest engineer in service shall have preference to runs. Engineers who have or does give up regular road runs for switch

178 engines loses his road rights, but retains his age as a yard engineer. All runs at present stand as they are until a vacancy occurs. All new runs or regular runs vacated will be advertised for ten days and any engineer who fails to accept or claim run when advertised waives all rights to same until it becomes vacant. The oldest available freight must do the extra passenger work. Men held for special duty will be paid full time."

Q. Now under that rule as enforced by the order representative and the railroad company could an engineer be changeed from one run to another, over his objection?

(Objections; sustained; exceptions.)

Cross-examination:

Q. Do you know McLendon?

A. Yes.

Q. Did you know how long he had been in the service of the G. & S. I. R. R. as engineer?

A. No, sir; but I have an idea.

Q. About how long had he been in service?

A. I judge 18 or 20 years.

Q. Do you know whether or not he had been in the service of the road long enough to be entitled to a run as a main-line engineer according to the rules of seniority?

(Objection, for the reason that the rule just read provides that when an engineer selects a switching job he loses his seniority on the main-line run.

Overruled; exceptions.)

Q. Do you know whether or not he had been in the service of the road long enough to be entitled to a run on the main line?

A. If he selected road service and did not change it of his own accord after he had acquired road rights and did not change himself.

Q. I did not have any "if" in it; had he been there long enough?

179 A. Yes; he was entitled—had been there long enough.

Q. Do you know why it was he was not on the road as engineer—the best engineer's job is the one on the road, is it not?

A. As a rule, it is considered that way.

Q. Considered a much better job than the engineer on the yard?

A. Yes.

Q. Do you know why McLendon, who had been in the service this length of time, was a switch engineer?

A. No.

Q. He had the right to be on the road, did he not?

A. If he wished it.

Q. Did the company in any instance prevent a man from having his right of seniority on the road by reason of incompetency or bad character—are there some engineers they cannot allow on the road at all?

A. If he is not competent—not considered a safe man in handling a train; I have known of cases.

Q. Were they kept in the switch yard?

A. Yes.

Q. You know why it is that McLendon was kept in the switch yard, or staid in the switch yard?

A. No, sir; I don't know the facts.

Q. Have you heard what the facts were?

A. Of this trouble?

Q. Why he staid in the switch yard?

A. I heard why he was in Hattiesburg—first accepted the job——

Q. Did you, at any time, have supervision or control over McLendon?

A. Yes.

Q. Did he give you any trouble?

A. No trouble; no; I had a great many arguments with him.

180 Q. You have complaints about him?

A. Yes; complaints.

Q. Were they constant or numerous?

A. I had several complaints.

Q. Were they constant or numerous.

A. Sometimes once a week; sometimes twice a week.

Q. Did you ever have any one under you that gave you any more trouble?

A. No; not any more.

Q. He was at the top of the list?

A. I was with him longer.

Redirect examination:

Q. You were asked about complaints; what was the character of the complaints made?

A. The complaints that came to me as yardmaster were brought about in nearly every case of McLendon observing the Book of Rules, especially orders—and he did not vary from the rules one bit—and that would cause a disagreement between him and the men; the average railroad man would vary from the rules, and he would not.

Q. What do you say about McLendon with reference to carrying the rules?

A. Lived up to them to a letter.

Q. You say that would bring about disagreement?

A. Yes.

Q. Were those complaints investigated by you?

A. Yes.

Q. What were the results of the investigation?

A. I would be vexed at him myself, but would have to rule in his favor.

Q. Why?

A. Because he was right and would never vary from the rules.

181 Did you ever report him to the superior officer who had the right to discharge him?

A. No; I was afraid to.

Q. Why?

A. To show myself up.

Q. In other words, the complaints against McLendon were in every instance because he obeyed the Book of Rules to the letter, which were not being done by the other railroad people?

A. I won't say every case, but every case to speak of, of any trouble to amount to anything.

Q. Was it a source of vexation or irritation to the switching foreman or conductor of the crew to have the engineer to obey the rules to the letter?

A. Yes.

(Objections; overruled; exceptions.)

Recross-examination:

Q. Do you know McLendon's reputation for peace or violence?

(Objections. Withdraw question.)

Q. Mr. McGregor, you say you have been knowing McLendon for a long time?

A. Yes.

Q. You yourself had been in service here for the G. & S. I. R. R. for some time?

A. Yes.

Q. And McLendon had been in service for some time?

A. Yes.

Q. And you had numerous complaints against McLendon before?

A. As to his work.

Q. I will ask you if you knew what his general reputation was for peace or violence?

(Objections.)

A. I never heard it discussed among the public——

182 Q. Among the employees was his reputation good or bad?

A. Disposition bad.

Q. Was he a man that would be known as a quarrelsome man?

A. Not if you did not go into a controversy about the work.

Q. I am talking about his employees on the work?

A. Among the employees; yes.

Q. They are the ones he worked with?

A. Yes; he was known as being contentious.

Q. All I am asking you is, Was he known as a quarrelsome man?

A. Not if you let him alone.

Q. There was no way to conduct the business of the company without having to be with him, and exactly what you mean is he was quarrelsome until he had his own way?

A. No, sir; if he had his own way and his idea of how to work should be done.

Q. But it was necessary to have his own way?

A. According to the way he worked it was.
Q. Is not that the way you usually define what a quarrelsome man is?
A. He did not interfere with anyone's ideas.
Q. Unless their idea interfered with his?
A. Yes.
Q. Did you state that you understood him to be a quarrelsome man about his work?
A. No; he was not quarrelsome if he was permitted to do his work as he wanted to do it.
Q. Do you agree in so far as the employees were concerned that his reputation for peace was bad?
A. No; it was not bad.
Q. Was it good?
A. No; it was not good.
Q. Was it medium?
A. Average man.
183 Q. You used the expression on yesterday that he was about the "worst you ever had to work for you," or what was your expression?
A. I believed that I had more controversies with him—arguments with him—and the worst and most contrary than most any man I ever worked.
Q. Would you not term such a man as being a quarrelsome man?
A. Not if he was right.
Q. How long were you out of the service—I mean here at the yard—before the shooting accurred?
A. I left here in 1913 and that occurred in 1917.
Q. That was the condition of events when you left?
A. Yes.
Q. Did you know Mr. Stevens?
A. Yes; quite well.
Q. He succeeded you in the position here, did he not?
A. Yes.
Q. How long did Stevens hold this same job you had?
A. About one year and left and was placed on the job again.
Q. He was on the job at the time of the shooting?
A. Yes.
Q. And had been for some time prior to that?
A. Yes.
Q. He was the man representing the company that had direct supervision over McLendon and others here in the yard?
A. Yes.
Q. He is the man representing the company that would come nearer knowing, in an official way, as to McLendon's acts, conduct, and character at the time the shooting occurred?
184 (Objections; sustained.)
Q. Where was Stevens?
A. Here in Hattiesburg.

Q. Has been here at the courthouse?
A. Yes.
Q. And is now in service in the yards holding this position?
A. Yes.
Q. Have you seen him here in the court as a witness?
A. Yes, sir; he was here this morning.
(Objection; sustained. Motion to exclude; sustained.)
By the COURT: Exclude all the testimony that has been given by any witness as to the attendance of Stevens; he is a witness for the plaintiff, summoned and attached on the part of the plaintiff; and it has been stated to the court by plaintiff's counsel that Stevens was here and that he had a talk, and plaintiff's counsel asked the court not to impose any punishment as there was a misunderstanding between him and Stevens as to his attendance. So do not consider anything about Stevens's absence and attendance here.

Redorect examination:

Q. You were asked on cross-examination about the controversies you had with McLendon, in which you answered that you had more controversies with him personally than any other man. Will you explain what those controversies were about or concerning?
A. Yes. As I stated yesterday, the average railroad man will violate the Book of Rules; they will go so far as to evade the rules to do the work, and McLendon would not; he would comply with them to a letter, and it would cause an ill-feeling between him and the men.
185 Q. Let me ask you this, that in refusing to violate the rules and the law and obeying them to the letter, who would start the controversues; would McLendon or would his associates or co-employees?
A. He would not say a word.
Q. Who would start the controversy?
A. The men that was out doing the work; his acts would make it more or less hard on the men in carrying out his work and he would start the controversy.
Q. Did you investigate the complaints made to you?
A. Yes.
Q. Just what would be the results of your investigation?
(Object to statement of his results; sustained.)
Q. With reference to whether McLendon was a fussy man or whether he was within his rights?
(Overruled.)
A. My results showed that it would be invariably men that wanted to disregard the rules to a good extent, and would fall out with him because he would not do likewise.
Q. How long were you yardmaster and McLendon under you?
A. I held the position that Green held first for four years—three years.
Q. Four years you were engine foreman over McLendon?

A. For three years; McLendon came here about one year after I did; the next five years I was yardmaster.

Q. When did you first come here?

A. 1904.

Q. Did you know what McLendon's character was for fussi-
186 ness, or notice of being a dangerous man with his men that worked with him?

A. Did not have any notice.

Q. With your association with him, was he a dangerous man to work with because of disposition to violence?

(Objections because it is leading; sustained.)

Q. Do you know what McLendon's character was for violence during the eight years you worked there with him?

A. With the exception of these differences there would be nothing to it.

Q. For fighting?

A. I considered him harmless in that respect.

W. E. LEONARD, witness for the defendant, first being duly sworn, testified as follows:

Q. What is your name?

A. W. E. Leonard.

Q. What position did you occupy in August, 1918?

A. Superintendent transportation.

Q. For what railroad?

A. Government; G. & S. I. and M. C.

Q. Prior to that time, when did you assume the duties of superintendent of transportation,

A. May 1st, I think, 1915.

Q. Prior to May 1st, what position did you occupy?

A. Superintendent.

Q. What railroad?

A. G. &. S. I.

Q. As superintendent of the G. & S. I. did you know Zack McLendon?

A. I did.

Q. State to the jury if you knew McLendon's—the character of McLendon as a man for peace and violence?

187 A. I did.

Q. Was he or not a peaceful man?

A. He was a peaceful man.

Q. I will ask you as superintendent, was it ever reported to you if he was a dangerous man to work with or information came to you that would lead you to believe him to be a dangerous man to work with?

A. No, sir.

Q. I will ask you if in the year 1915, April 1st, you entered into a contract with the engineers of the G. & S. I. R. R. with reference to their work, pay, and seniority?

A. I know that we entered into a contract but I don't recall it.
Q. Is that the contract I hand you?
A. Yes.
Q. I will ask you who signed the contract on behalf of the railroad company?
A. I did.
Q. And who signed it on behalf of the engineers and other contracting parties?
A. M. G. Brown, supt. motive power; engineers, W. E. Avery, L. V. Schmidt, H. B. Jordan, W. D. Meadows.

Mr. DUVALL, witness for the defendant, being first duly sworn, testified as follows:

Q. What is your name?
A. Duvall.
Q. What is your occupation?
A. Engineer on the G. & S. I.
Q. How long have you been engineer?
A. Eighteen years.
Q. Do you know McLendon?
A. Yes.
Q. How long have you known him?
A. Pretty nearly 20 years.
188 Q. Do you know why McLendon left the main line run and took the switching job as engineer?
A. Yes.
Q. Tell the jury.
A. In 1904 or 1905 he was doing the passenger work extra when he—the regular passenger run out one night he went into Gulfport he run into a cut of cars and got hurt and also hurt his fireman and was off some time, and when he reported for work they gave him the switch engine; after he had been on the switch engine a certain length of time he gave up his rights on the road.
Q. State to the jury whether or not he worked on the switch engine by order of the company or choice of McLendon.
A. Choice of McLendon.
Q. The Order of Locomotive Engineers had a contract with the G. & S. I.—and Mr. Leonard identifies this as being the contract—I will ask you if that is the contract the engineers worked under?
A. Yes; that is one of them.
Q. Was that contract effective on the 5th day of August and prior to that time during the year 1918?
A. Yes.
Q. I will ask you to turn to rule 15 in that contract and read that rule.
A. "The oldest engineer in service shall have preference to runs. Engineers who have, or does give up regular road runs for switch engines loses his road rights, but retains his age as a yard engineer. All runs at present stand as they are until a vacancy occurs."

Q. Does that contract provide which is the preference run of switch engineers in Hattiesburg—the day or night run?

A. Yes.

Q. Which is the preference run?

A. Day run.

189 Q. As an engineer in the service for eighteen years and who is acquainted with the rules and customs as well as all the contracts between the railroad company and the engineers, would the railroad company be permitted to discharge an engineer against whom the switching foreman made complaint where an investigation showed the complaints were made because the person refused to violate the rules of the company?

(Objections; sustained; the rules speak for themselves.)

Q. Did the rules provide what an engineer must do before he can be discharged—does that rule you hold in your hand—does that make provision?

A. Yes.

Q. Will you turn to that rule?

A. Specify. I don't know whether it means what he should do—I would have to explain that question before I could answer this. Here is article 13 in the agreement: "No engineer will be discharged or suspended without sufficient cause—In case is taken off, will be given a thorough investigation in four days. He will have the right to appeal from local to the general officers of the company"——

Q. Who had the authority to employ and discharge engineers?

A. Master mechanic as to the hiring of them, but I understood the discharge came through the superintendent.

Q. Could the yardmaster in the yard at Hattiesburg discharge an engineer?

A. No, sir; he might recommend it or have something to say before the investigation, but he has not the authority of taking one out of the service. I never heard of it.

Cross-examination:

Q. He has supervision and control of him?

A. In a certain way.

190 Q. Rule 582 provides what his rights are, does it not; they have charge of the yards located in their territory, men employed, and movement of trains?

A. That does not give the authority to discharge men.

Q. He had the direction and control?

A. Yes.

Q. And for any reason he should be an unfit engineer or even careless or reckless it became the yardmaster's duty to report him?

A. Yes; I suppose so.

Q. And if he did not do it he would be negligent in his duty?

A. I suppose so.

Redirect examination:

Q. Under the contract that you had with the railroad company and engineers providing for a man to be discharged for only good cause shown, would it be sufficient cause for his discharge under the contract as interpreted by the company and the engineers for an engineer to be contrary in a dispute with his engine foreman about the handling of trains, which the foreman forced upon him; would that be cause to discharge the engineer?

A. No, sir; as long as he conformed with the Book of Rules and directions they would have no right.

Q. And under that contract could the railroad company have discharged, according to the construction and usage the railroad company placed upon the contract?

A. No.

Q. Under the rule of seniority as construed and endorsed by the railroad company, could McLendon have been changed from the day run as an engineer over his objections?

A. No, sir; he was entitled to the day run—that is what seniority calls for—the oldest men have the preference.

191 (Objections; overruled, exceptions.)

Mr. JACOBS, called as a witness for the defendant, having been duly sworn, testified as follows:

Q. Your name is Jacobs?

A. Yes.

Q. I believe you testified yesterday on behalf of the plaintiff in this case?

A. Yes.

Q. What were you doing on the date of August 5th, 1918?

A. Derrick engineer.

Q. How long after this fatal tragedy occurred before you went to the scene?

A. I expect it was 20 minutes. I did not hear the gun shoot or anything like that.

Q. How did you come to know of the accident?

A. I seen the engine stop up there some time and I seen the fireman coming and called to me if I would telephone the sheriff. I telephoned the sheriff and told them—the engine was on the main line and they asked me to telephone Mr. Oakley, and I did.

Q. Did you see Knight, the witness who testified here, at that time?

A. Yes; he was at the shack.

Q. Did you have a conversation with him; did he make any report to him, statement?

A. It was talked about what happened, and——

(Objections.)

Q. Eliminate the conversation and go on. Where was the shack with respect to the location of the engine and where was McLendon and Green were standing at the time?

A. About as far as from here to the Carter Building.

Q. As derrick engineer do you keep a book in which you keep records of the coal and other things you use?

192 A. Yes; I usually keep that.

Q. When you went up to the switch engine did you make a record of the cars and of the rolling stock being handled by the engine at that time?

A. When the sheriff got there they pulled the engine and cars on down in the yard, and as they passed me I put the numbers down.

Q. What was that engine pulling?

A. Four coaches and coal hoist and a gon.

Q. What is that coal hoist; where was it being moved to?

A. From the Southern yard back home to the G. & S. I. shops.

Q. Do you know how it came to be in the Southern's yards?

A. They had borrowed it.

Q. You say it was being moved back home, for what purpose?

A. I don't know.

Q. What was it used for when it got back?

A. They put it in the shop and repaired it and sent to Jackson.

Q. That was used for what purpose?

A. Handling coal.

Q. Tell the jury how it handles coal.

A. Has a big dipper, and we pick coal from the chute and throw it in and load the cars and engine with it.

Q. What engines did you load with that hoist?

A. All of them.

Q. All of the engines?

A. At that time we were using another at the shops, but that coal hoist had been to the Southern, but was the same kind.

Q. I am talking about this particular coal hoist—when it was taken to the shops and repaired and was sent where?

193 A. Jackson.

Q. For what purpose?

A. To coal engines.

Q. What engines was there to coal?

A. G. & S. I.

Q. And those engines were used for what purpose?

A. Freight and passenger and switch engine service.

Q. What passenger coaches were in that train?

A. As I walked down the train as they roll by I take the numbers of the coaches; the coach next to the engine was No. 20 and the second coach from the engine was No. 22, next one was No. 13, and next one No. 12.

Q. Was there anything else in that train other than the coal hoist and four coaches?

A. And the gon.

Q. What is the gon; do you know what that gon was?

A. No, sir; I had the number, it is torn out of my book. I put it down on that date and I see it is torn out.

Q. When did you make that record in that book of these coaches?
A. About thirty minutes after the killing.
Q. That book been in your possession ever since?
A. Yes.

Cross-examination:

Q. This coal hoist that you talk about, I understand it was not in service at all at the time the shooting occurred—had been borrowed by what road?
A. The Southern.
Q. Am I right in repeating that you stated it was not in service at all?
A. Not at that time.
Q. The Southern had another coal hoist it was using?
194 A. They had been using it.
Q. But they had another they were using at this time?
A. Not that I know of.
Q. Didn't you say they had another?
A. The G. & S. I. had another.
Q. They had another coal hoist they were using, and this so far as the G. & S. I. was concerned had been out of service some time?
A. Yes.
Q. And had not yet been returned to service?
A. Yes.
Q. The company finally decided it would send this coal hoist to Jackson after repairing it.
A. It went up that week.
Q. After it went to Jackson did you say it was used in loading coal on the cars, etc.?
A. Yes, sir.

Redirect examination:

Q. You were asked if the coal hoist was in service; where was it being carried at the time?
A. It was put in the local next to the caboose and went north, and some time after that I was there and——
Q. Where was it being carried with that engine?
A. From the Soythern's yard to the shops.
Q. Why to the shops?
A. I don't know, but they repaired it before it went up to Jackson.
Q. After they carried it to the shops what did they do with it?
A. Repaired it.
Q. And after being repaired what happened to it?
A. Sent it up the road.
Q. And you saw it at what point?
A. Jackson.
195 Q. What did you see it doing at Jackson?
A. Coaling engines.

Mr. LYNN, witness for the defendant, being first duly sworn, testified as follows:

Q. What is your name?
A. Lynn.
Q. Where do you live now?
A. Hattiesburg.
Q. Where did you live in August, 1918?
A. Gulfport.
Q. How long had you lived in Gulfport prior to August 5, 1918?
A. Off and on since 1901.
Q. What was your occupation August 5, 1918?
A. Master mechanic.
Q. How long had you been—and for what road?
A. G. & S. I.
Q. How long had you been?
A. Since November, 1915.
Q. Who had the authority to employ and discharge engineers in the service of the G. & S. I. R. R. from 1915, the time you assumed the duty of master mechanic, up to and including 1918?
A. The master mechanic.
Q: That was your position and your duty?
A. It was.
Q. Did you know McLendon?
A. Yes.
Q. Was there ever any complaint made to you against McLendon with reference to his disposition or character for peace and violence that would occasion his discharge?
A. No, sir.
Q. Did you know his character with reference to being a dangerous man to work with?
A. Did I know him to be dangerous?
Q. Yes.
196 A. No, sir; did not.
Q. Did any one ever make a report to you that he was a dangerous man to work with?
A. No, sir; never.

Cross-examination:

Q. How long had you been working for the railroad?
A. Since 1901.
Q. Work for the railroad now?
A. Yes.
Q. Same capacity work from August 5th, 1918?
A. Not now.
Q. Is it a higher or lower position?
A. Higher.
Q. Have you any more authority now than you had then?
A. Yes, sir.

Q. You had known McLendon for a number of years, had you not?
A. About 17 years.
Q. And you knew that he killed one man?
A. No; I did not.
Q. What is the custom—I believe you hire and discharge engineers?
A. I did at the time.
Q. You make any inquiry about a man's fitness to hold these positions?
(We object for the reason that the question of fitness of McLendon at the time he was employed is not in question in this case; overruled; exceptions.)
A. Yes.
Q. At any time during the investigation inquire as to their fitness for performing their duties?
A. Yes; when complaints come to us.
Q. Independent of complaints, you make no inquiry whatever, do you?
A. Yes; we look after them, and see if any violation of the rules we go into it.
197 Q. You remember McLendon having several complaints made against him, and you sat as a member of the board; what do you call that?
A. No; a committee. I never sat on his case any time while master mechanic, but while I was foreman I sat in two investigations.
Q. In those two investigations it was about him being an obnoxious and vicious fellow about his work, was it not?
A. No, sir.
Q. Was it about him being quarrelsome or breaking the rules of the company?
A. No, sir.
Q. Now, you don't know what it was about, do you?
A. One was—I sat in two investigations—the switchmen claimed that they could not do the work; he was too slow, and it developed in the investigation that he had operated by the rules of the company and the laws of the city——
Q. That was according to your judgment?
A. Yes.
Q. In that investigation did it come out that he had cursed and abused this fellow who claimed he was not running his engine fast enough?
A. No, sir.
Q. You remember when he got after a Negro up there with Mr. Godwin with a hammer?
A. No, sir; I do not.
Q. Outside of the two investigations that you sat in did you have any other complaints made where you did not investigate it?
A. No, sir; did not.

Q. You know whether Mr. John Stevens had any complaints about him or not?

(Objections; overruled.)

198 A. No, sir; I do not—never made any to me.

Q. You don't know what John Stevens knew about the general reputation for peace or violence of this man McLendon, do you?

(Objections; overruled; exceptions.)

A. I do not.

W. L. OAKLEY, witness for the defendant, first being duly sworn, testified as follows:

Q. Your name is W. L. Oakley?

A. Yes.

Q. What position do you occupy?

A. Chief despatcher G. & S. I.

Q. How long have you been chief dispatcher?

A. Since March 13, 1917, the last time.

Q. I will ask you if you have a record of coaches No. 20, 22, 13, and 12 and their movement and for what purpose they were used?

A. Yes; we have a record in the office showing these coaches, the train they operated on, and for what purpose used.

Q. Do you know coaches M, D, K, and for what purposes they were used about August 5, 1918?

A. Yes; if I know the numbers.

Q. Take coaches No. 20, 12, 13, and 22?

A. Used on regular line—coaches operated on all rails using the G. & S. I. R. R. for any passenger business that they may be called upon to transport.

Q. They then operated in the regular trains and regularly used for transportation?

A. They were used as regular cars or extra cars either, as the occasion required.

Q. Have you the record with you?

199 A. No, sir; did not bring any records with me—the train sheets are at the office.

Q. Take coaches No. 12, 13, and 20; what were they used for on the day preceding August 5th, 1918, and for what purpose were they used on August 4th and on August 6th, 1918?

A. They were used for the regular passenger service of the G. & S. I. R. R.

Q. In the regular passenger service what passengers were carried from Hattiesburg on August 4 and 6, 1918?

(Objections; overruled for the present.)

A. I would say that the cars were used in the regular passenger travel of the G & S. I. R. R. as to dates; some of the passengers went to G. & S. I. points, and possibly some went beyond the G. & S. I. R. R.

(Object to possibility.)

A. I will state that some of the passengers went to G. & S. I. points, and some went beyond the G. & S. I. points.

Q. I will ask you to state whether or not those coaches were used regularly in transporting interstate passengers over the G. & S. I.?

A. Yes; they were used on the railroad for transporting all kinds of travel.

Q. What was located here with respect to the concentration of interstate passengers?

A. I don't understand.

Q. Was there any occasion at the time for the handling of interstate passengers other than the ordinary time?

A. During that period we enjoyed a camp, and we kept our extra equipment here for emergencies which would arise from time to time.

200 Q. Those coaches being left here, and it is in evidence they were being carried down at the time to be cleaned and prepared to go back in service, were put in service to accommodate what passenger demand?

A. Any passenger demand that the railroad might be called upon to handle.

Q. What would be the occasion of extra passenger coaches being handled from Hattiesburg at that time?

A. Because of the camp—bringing a vast number of people here—and it required more than the regular coaches on the train at the time to carry the people who presented themselves for transportation.

Q. Do you mean soldiers?

A. Not exclusively; both.

Q. Did you handle soldiers at that time in these coaches?

A. Yes; we handled both going and coming on all trains and coaches.

Q. At that time?

A. Yes.

Q. And those passengers were being transported largely from what points to Camp Shelby?

A. I can't state offhand from what points, but we received a vast number from the I. C.

Q. Were those interstate passengers or intrastate passengers?

A. Some of them were interstate while others were intrastate.

Q. I will ask you if you can state, if you know, that the occasion of those coaches being left here, being the regular coaches, was for the purpose of handling the intrastate passengers, being the soldiers located at Camp Shelby, in bringing them in and carrying them back?

A. That is what we kept the cars here for.

201 Q. And they were used for that purpose?

A. Yes.

Defendant rests.

Plaintiff asks leave of the court to introduce an insurance expectancy table of mortality showing the life expectancy.

By agreement of counsel, the mortality table may be read to the jury, which is done, as follows:

Age.	No. living.	No. dying.	Logarithm No. living.	Logarithm No. dying.	Yearly prob. of dying.	Logarithm prob. of dying.
38	78,611	749	3.9009731	1.8744818	7.9735067	0.009408

Expectation of life 2(.62.

Plaintiff rests.

Defendant rests.

Stenographer's certificate.

I hereby certify that the foregoing 131 pages contain a true and correct transcript of all of the oral testimony taken by me of the witnesses in the above-styled case.

I do further certify that I have on this the 9th day of June, 1920, delivered the above record to the clerk of the Circuit Court of Forrest County, Mississippi, and that I have advised Messrs. Currie & Currie, E. L. Dent, and J. W. Cassidy, representing the plaintiff, and T. J. Wills and Tally and Mason, representing the defendant, of the filing of this record.

Witness my signature this the 9th day of June, 1920.

JENNIE F. SMITH,
Official Stenographer.

Filed 6-9-1920. J. S. Garraway, clerk.

202 *Certificate of circuit clerk.*

STATE OF MISSISSIPPI,
Forrest County:

I, J. S. Garraway, clerk of the Circuit Court in and for said county do hereby certify that the foregoing is a true and correct copy of the Caption of the court, Nov. term, 1919, Declaration, Summons, General issue plea, Order, Motion for bill of particulars, 1st and 2nd special pleas (filed Nov. term), Petition, Reply to petition, Caption of court, April term, 1920, Declaration, Petition of pltff., Letters of administration, summons, General issue plea, 1st and 2nd plea (Jany. term, 1920), Replications, Demurrers, Motion to combine suits, Order, Motion requiring pltf. for bill of particulars, Motion to amend declaration, Instructions for plaintiff and defendant, "Given" and "Refused," Judgment, Motion for new trial, Notice to stenographer, Notice of appeal, Certificate of clerk and cost bill in the case of Mrs. Maude E. Green v. Dir. Gen. of Railroads, as same appears of record and on file.

Given under my hand and seal of said court, this the 18th day of Aug., 1920.

[SEAL.] J. S. GARRAWAY, *Circuit Clerk.*

Cost bill.

To copying 27,720 words at 10 cts. per 100 words	$27.72
Express	.50
Taxing cost	.25
2 certificates	.50
1 bond	.50
Binding fee	.60
Official court stenographer, cost bill	39.30
	$69.37

STATE OF MISSISSIPPI,
Forrest County:

I, J. S. Garraway, clerk of the Circuit Court in and for said county, do hereby certify that the foregoing is a true and correct copy of the cost bill in the case of Mrs. Maude E. Green v. Walker D. Hines, agent, G. & S. I. R. R.

Given under my hand and seal of said court this the 18th day of Aug., 1920.

[SEAL.] J. S. GARRAWAY, *Circuit Clerk.*

This record endorsed on back as follows: "No. 21567, Second district Circuit Court, Forrest County. Walker D. Hines, agent, Gulf & Ship Island R. R. Co., vs. Mrs. Maude E. Green, Admrx.
203 Filed Sept. 29, 1920. W. J. Buck, Clerk Supreme Court of Mississippi."

Assignment of errors.

WALKER D. HINES, AGENT FOR UNITED STATES R. R. Administration
vs.
MRS. MAUD E. GREEN, ADMINISTRATRIX. } No. 21567.

ASSIGNMENT OF ERRORS.

Comes the appellant in the above-styled cause, by his attorneys, and says that in the trial of said cause in the court below and in the holding and rulings of the Court therein, there was manifest error in the following particulars:

First. The court erred in admitting the testimony offered on behalf of the plaintiff over the objection of the defendant, as appears in the record herein on pages 88, 92, 93, 101, 126 to 130, 136, and 142 to 144.

Second. The court erred in excluding the evidence offered by appellant defendant in the court below, as appears of record in this cause on pages 104, 177, 179, 190, and 199.

Third. The court erred in overruling the defendant's motion to exclude the testimony offered on behalf of plaintiff and to peremptorily charge the jury to find for the defendant at the conclusion of the plaintiff's testimony, as shown on R. p. 125.

Fourth. The court erred in reopening the case and allowing the testimony of the witnesses to be introduced, which had been previously excluded to show specific acts of alleged violence on the part of the engineer, McLendon, as appears from R. p. 126 to R. p. 153.

Fifth. The court erred in overruling the motion to exclude
204 all the testimony offered on behalf of the plaintiff and charge the jury to find for the defendant at the conclusion of plaintiff's case, as appears from R. p. 153.

Sixth. The court erred in refusing the peremptory instructions requested by appellant at the conclusion of all testimony, as appears in the record on page 64.

Seventh. The court erred in giving each and every instruction granted the plaintiff, as instructions Number 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, appearing in the record on pages 56 to 59, inclusive.

Eighth. The court erred in refusing each and every instruction refused the defendant, being instructions Number 1, 2, 3, and 4, asked by the defendant and refused by the court, as appears by record page 64 to record page 65.

Ninth. The court erred in overruling the motion for a new trial made by appellant and overruled by the court, as appears on R. p. 68–70.

Tenth. The court erred in entering the judgment on the verdict contrary to the law and the evidence in this case.

Eleventh. The court erred in entering a judgment for $35,000.00 on the verdict in this case, the said verdict being excessive and not supported by the law and evidence in the case, and shows that the jury was influenced by passion and prejudice by the rendition of said amount.

Twelfth. The court erred in entering the judgment for $35,000.00 in this case, for the reason that if there were any liability whatsoever the maximum amount of recovery under the law would be $16,864.32, as is fully set forth in paragraph 9 in the motion for a new trial filed in the court below.

Thirteenth. The court erred in refusing to extend the demurrer filed by the plaintiff in this cause back to the declaration in the case and sustain the demurrer to the declaration as failing to state a cause of action and dismiss the cause.

TALLY & MASON,
205 B. E. EATON AND T. J. WILLS,
Attorneys for appellant.

(Endorsed:) Filed, Jany. 17, 1921. W. J. Buck, clerk.

Organization of Supreme Court of Mississippi, March term, 1921.

Minutes Supreme Court of Mississippi, March term, 1921.

Pleas and proceedings had and done at a regular term of the Supreme Court of the State of Mississippi begun and held at the court room at the capitol in the city of Jackson, Mississippi, on the first Monday, being the 7th day of March, 1921, sitting en banc.

Present: The Honorable Sydney Smith, chief justice, the Honorable Sam C. Cook, the Honorable J. B. Holden, the Honorable Eugene O. Sykes, the Honorable George H. Ethridge, the Honorable William Henry Cook, associate justices; and W. J. Buck, clerk, in person, and by W. J. Brown, D. C., and C. L. Johnson, marshal.

Order of submission.

Minutes of Supreme Court of Mississippi, March term, 1921, Tuesday, March 8th, 1921.

WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, Agent Gulf & Ship Island Railroad Co.,
vs.
MRS. MAUDE E. GREEN, ADMINISTRATRIX. } No. 21567

Argued orally by T. J. Wills and Jno. R. Tally for appellant and J. W. Cassedy and E. L. Dent for appellee, and submitted on briefs by T. J. Wills and Tally & Mason for appellant and E. L. Dent and J. W. Cassedy and Currie & Currie for appellee.

206 *Judgment.*

Minutes Supreme Court of Mississippi, March term, 1921; Monday, April 4th, 1921.

WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, Agent Gulf & Ship Island Railroad Co.,
v.
MRS. MAUDE E. GREEN, ADMINISTRATRIX. } No. 21567.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Forrest County, and this court having sufficiently examined and considered the same and being of opinion that the verdict is excessive, doth order and adjudge that if a remittitur be entered for all of said judgment in excess of the sum of sixteen thousand dollars the judgment of said Circuit Court will be affirmed for said sum of sixteen thousand dollars, and appellee having filed a remittitur herein for the sum of nineteen thousand dollars, it is ordered and adjudged that the judgment of said Circuit Court rendered in this cause at the April term, 1920, on

the 8th day of May, 1920, be, and the same is hereby, affirmed for the sum of sixteen thousand dollars, and that appellee do have and recover of appellant said sum of sixteen thousand dollars as well as interest on said sum from May 8th, 1920, until paid, at the rate of 6 per centum per annum, and also the costs of this cause in this court and in the court below, to be taxed, etc.

Opinion of the supreme court.

In the Supreme Court of Mississippi.

WALKER D. HINES, AGENT GULF & SHIP ISLAND R. R. CO., *v.* MRS. MAUD E. GREEN, ADMINISTRATRIX. } No. 21567.

In banc: Ethridge, J.

(6349)

207 Mrs. Maud E. Green, the appellee, brought suit against the appellant in the Circuit Court for the death of her husband, an employe of the appellant, his being *being* brought about by an engineer in the service of the appellant killing the appellee's husband at a time when the engineer and the deceased were employed by the appellant and engaged in moving some passenger cars from one point in the yards in Hattiesburg to another point in the yards. The original declaration was filed in three counts, alleging that the engineer was an unsafe and dangerous man to be employed and with whom to work on account of his quarrelsome, dangerous, and vicious habits and character, which were known to, or by the exercise of reasonable diligence ought to have been known to the appellant.

The appellant defended under the general issue and filed certain special pleas. Among other pleas, it plead that the deceased and the engineer were at the time of the killing engaged in interstate commerce for the appellant, and that the liability of the appellant was covered by the Federal employers' liability act, and that under this act there was no liability upon the appellant for the death of the appellee's intestate. When this plea was filed by the defendant a new suit was filed by the appellee as administratrix under the Federal employers' liability act in which the acts alleged in the other suit were declared on, and it was alleged that at the time of the injury the deceased and the engineer were engaged in the business of the master and in furtherance of the master's business, bringing the case under the Federal employers' liability act, and then, upon motion of the appellee, the two suits were consolidated by the Circuit Court without objection, and the case proceeded to judgment, resulting in a verdict and judgment of $35,000.00 in favor of the appellee as administratrix.

208 On the trial it appeared that the deceased was a conductor of a switching crew operating in the yards at Hattiesburg, Mississippi, and that the engineer was the engineer in charge of the cars being moved from one point in the yard to another point. While the movement was being made, the switchman who accompanied the crew gave the engineer a signal which he repeated several times, and the engineer had told the switchman not to signal him but once, that he was on the watch and would see the signal, and when the switchman signalled more than once on this occasion and remounted the running board on the engine, the engineer came down with a hammer and accosted the switchman about disobeying his admonition or instruction about the signal. The switchman, who was a Negro, told the engineer that he was doing his duty as best he could under the instructions of Mr. Green, the deceased, who was the foreman of the crew. Whereupon the engineer told the switchman that he would kill him and Mr. Green too, and knocked the switchman off the running board with the hammer. This resulted in certain of the crew being taken from the train to carry the switchman to the hospital. The engineer moved on to the switch which lay along his route, and when he reached the switch it had not been thrown so as to permit him to proceed, and he stopped the engine, and Mr. Green, the conductor and foreman, proceeded from the cars being moved to the switch to throw the switch, it being his duty to do so in case the switchman was not available for that service. While he proceeded from the cars to the switch, McLendon, the engineer, came down from the engine with a pistol and took his stand near the front of the engine, and, as Green, the conductor and foreman, came up, accosted him with the remark: "Why in the hell have
209 you not thrown the switch?" The only person who was produced at the trial who heard this remark was engaged in working on some cars near the point, and passed around the car in his work, and in a few moments heard a pistol shot. There were two or three shots fired, and when the first shot was fired other persons saw McLendon, the engineer, but did not see the deceased. McLendon refused to let anyone approach the body of the deceased until he had taken an iron pin and placed it near the man and had sent for a policeman to come to the scene.

It was in proof that some years before the killing in question the deceased and McLendon had worked together and that they did not get along, having personal difficulties about the work. The railroad company, on the application of the deceased, Green, had changed him from a day crew to a night crew and they worked separately until some eight or nine months before the killing. Prior to the killing some eight or nine months there had been a strike, and in the settlement of the strike between the employes and the railroad company, and separate contracts had been entered into under which the railroad company had agreed that the different brotherhoods under which its employes were organized, McLendon being a member of the Brotherhood of Engineers, and the deceased, Green, being a mem-

ber of the conductors' organization, which contracts gave the employes the right to select positions in the service according to the rule of seniority, that is to say, the man who had been longest in service of the railroad company had the first right to select his service, and those who had been in the service a less time having to select from the positions available after their seniors had selected employment. After this contract was executed Green, the deceased, applied to the railroad company for work during daylight, that being more desirable than the night work. At first the railroad company had
210 declined or failed to give him the promotion, but *but* was approached by the manager of the conductors' organization and told that Green had a right under his contract to select the position. The railroad company told Green that if he would arrange with the man in charge theretofore of the daylight work to change positions that it would be all right, and the change was accordingly made. When the change was made it threw Green into the crew in which McLendon, the engineer, was working in the switching operations in the yard. The railroad company set forth by plea that Green had assumed the risk of working with McLendon by virtue of his claiming his rights under the contract and that his administratrix could not recover because of that fact under the Federal employers' liability act. The pleadings made an issue on this proposition and the case was submitted to the jury on instructions as to the rights of the parties bearing on the assumption of the risk, in effect telling the jury that if Green knew of McLendon's character and placed himself in association with McLendon with knowledge thereof under his contract with the railroad company, that he had assumed the risk incident to working with such a dangerous man, and submitting the counter proposition that if he did not know that McLendon was a dangerous man with whom to work that he would not assume the risk.

It appears from the evidence for the plaintiff that McLendon was a contentious, disagreeable, and quarrelsome man; that he was constantly embroiled with his fellow employes in quarrels about the work; that he would not obey the signals; and that he was a stickler for the rules; that he frequently had quarrels, and that he habitually carried a pistol either on the engine seat or upon his person; and that he had been frequently reported to the railroad company. It also appeared in evidence that Green had reported him for vio-
211 lating his duties on a number of occasions. It was also in testimony for the plaintiff that he, the engineer, had several times tried to catch Green between the cars and then move his engine so as to injure him. It was also in proof that he had killed a man prior to the killing of Green about some matter disconnected with the railroad business, and that the employes of the yard regarded him as a turbulent, dangerous, and violent man, and also that he had the general reputation in the community of being a dangerous, quarrelsome, and violent man.

The first question, and the most important to be decided in this suit, is whether or not the killing grew out of the master's business

while the two men were employed about the master's business and in furtherance of the master's business, and whether the master is liable for the death of one of its employes at the hands of another employe when not caused by the movement of the cars or physical appliances of the master, but caused by a weapon as in the present case.

The appellant relies principally upon the case of Hines, Director General, v. Cole, 85 So., 199, in which case this court held that the employes in that case were not in furtherance of the master's business and that the quarrel in that case was the private quarrel of the parties involved in that case. The character of the employe for peace and violence was bad, as here. The rule as stated in the syllabus is as follows:

"The master is not liable for the wrongful assault by one servant on another, unless the servant in making the assault was acting within the course of his employment, with a view to his master's business."

The converse of the rule is true, that if the assault is made while acting within the course of his employment and with a view to
212 his master's business, the matter is liable, especially where he has knowledge that the servant has such a character for violence or has such a vicious disposition as to make the assault probable. Under the Cole case it is held that when the fellow-servant rule does not apply the master is responsible for an injury wrongfully inflicted by one servant on another acting within the course of his employment with a view to his master's business, although the master was not negligent in employing such servant, or in retaining him in his service.

In the present case there is ample proof that the master had knowledge of the vicious disposition and violent character of the engineer who committed the assault in this case as to make him liable regardless of the rule above stated, provided, of course, that the servant was acting within the scope of his employment and with a view to his master's business. We think the rule in this State and the rule in the Federal court is the same as to this proposition, and it would be immaterial which law governed so far as this feature of the case is concerned, provided the engineer was acting within the scope of his employment and with a view to his master's business. Do the facts of this case show that the engineer and the deceased were so acting in the course of their respective employments and with a view to the furtherance of the master's business? They were engaged in moving the master's cars and machinery from one point of the yard to another point of the yard. In order to carry the car to its destination it was necessary to pass through the switch about which the difficulty arose, and it was the fact that the switch had not been thrown and the track cleared so that the engineer could proceed to his destination that he accosted, assaulted, and killed the deceased. It was no private quarrel, but was a quarrel about
213 the master's business, and it was because the engineer was delayed and hindered in proceeding to his destination that

he was irritated, caused him to quarrel, make the assault, and kill the deceased. It was the deceased's business to throw the switch under the circumstances that confronted the crew at the particular time; and it was his business and he had authority to control the movement of the trains, but it was the engineer's duty to move the train, and we think it was within the scope of his power and duty to call for an explanation where one was reasonably required as to why the switch was not thrown or as to why the track was not cleared so he could proceed to his destination. So far as the question as to whether the two men were engaged in the master's business, about the master's business, and whether the quarrel occurred and the killing resulted from this relation, the evidence amply sustains the plaintiff's contentions as to liability on this feature of the case.

Up to this point the State and Federal laws, we think, are in harmony, but questions now arise in which the rule in the two jurisdictions differs. Under the Federal employers' liability act the doctrine of the assumption of the risk applies where the servant injured knew and appreciated the risk and voluntarily continued in the employment after such knowledge without promise on the part of the master to remedy the condition; while under the State law, if the master is negligent, the servant does not assume the risk. There is also a difference in the elements for which damages may be allowed in the two jurisdictions. Under the State law the plaintiff will be entitled to recover the net present cash value of the expectancy, and also would be allowed to recover for damages from the loss of association, counsel, consortium, etc., while under the Federal employers' liability act the plaintiff would be limited to the monetary value, or the present value of the amount of money
214 they would have received for support, gifts, etc., had the deceased lived, and would not be entitled to recover for such parts of the value of the expectancy as the deceased himself would have earned but would not have turned over to the family, and they would not be entitled to damages for loss of society, counsel, or consortium.

The defendant by proper pleadings and by proof tending to sustain its pleadings raised the issue of the assumption of risk in working with the engineer, and the trial court peremptorily instructed the jury for the defendant that the Federal employers' liability act controlled the case, and the elements of damage involved under that law was all that was submitted to the jury for consideration, and the verdict exceeds the amount of the present value of the expectancy of the deceased. The plaintiff contended in the court below that the liability was given by the State law and contends in this court that this is true.

In view of the difference in the rule under the State law and the rule under the Federal law, it is important to determine which law governs the transaction. The switching movement in the yard which was being done at the time of the killing was a movement of cer-

tain passenger cars and a coal loader and a gon. The coal loader was being carried to the shops for repair and was not in use by the railroad company immediately preceding the movement nor was it placed back in the service of loading cars for several days thereafter. The passenger cars had not been used in service on the day of the injury in any movement or in any operation for the railroad company, nor were they being carried to be cleaned for immediate use, but were in fact placed in the service of the railroad
215 company the day following the injury. These passenger coaches were used both for intrastate commerce and for interstate commerce as the needs of the railroad company called them into service. The injury occurred in the forenoon and there was no purpose to use these cars during the day of the injury, nor was there any fixed or settled purpose to use them in such service at any particular time. Their use, or whether they would be used or not, depended entirely upon the circumstances which might arise, and were not controlled by any circumstances then existing, nor was there any settled purpose to use them at any particular time. They were merely used when the needs of the railroad company required their use.

The United States Supreme Court has laid down the test for determining whether the Federal employers' liability act was applicable in the following language:

"Generally, when applicability of the Federal employers' liability act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it." Southern Pac. Co. v. Industrial Accident Commission, 251 U. S., 259, 64 L. ed. 258, Sup. Ct. Rep., 259, 263, Pedersen v. Delaware L. & W. R. Co., 229 U. S., 146, 151, 57 L. ed., 1125, 1127, 33 Sup. Ct. Rep., 648, Ann. Cas., 1914C, 143, 3 N. C. C. A., 779; Shanks v. Delaware L. & W. R. Co., 239 U. C., 556, 60 L. ed., 436, 438, L. R. A. 1916C, 797, 36 Sup. Ct. Rep., 188; New York C. R. Co. v. Porter, 249 U. S., 168, 63 L. ed., 536, 39 Sup. Ct. Rep., 188; Kinzell v. Chicago, M. & St. P. R. Co., 250 U. S., 130, 133, 63 L. ed., 893, 896, 39 Sup. Ct. Rep., 412.

Measured by this test the facts do not bring the case within the Federal employers' liability act for the reason that none of the
216 things being operated and moved at the time of the injury were being then used in interstate commerce, nor were they intended to be so used immediately upon being placed in condition for use, nor was there any fixed time or purpose for their early use so as to make them so intimately connected with interstate commerce as to be practically a part thereof.

There are a number of assignments of error as to instructions complained of by the appellant, but the errors, if any, are favorable to the appellant, and require more facts to be found to render liability against the appellant than the law required.

There is one assignment of error, however, that is serious, and that is that the verdict is excessive. The trial proceeded, as above, on the theory that the plaintiff was limited to elements of damage recognized by the Federal employers' liability act, and as the jury only had these elements submitted for its consideration, the verdict is excessive, and it can not be upheld upon any theory that the jury might have found elements of damage, if properly instructed, which might be sustained under the elements recognized by the State law. There is no theory or contention in the record or in the arguments for the allowance of punitive damages. The expectancy of the deceased was 29.62 years, and he was a healthy man both in mind and body, and was earning five dollars per day. This would amount to $1,825.00 per year. The evidence does not contain any calculation of the expectancy, nor are any tables introduced by which computation may be made according to any standard, recognized mortality tables. But finding the present value by dividing the total expectancy, if earned, by one plus six per cent, the legal rate of interest, for the average number of years of the expectancy, which in the absence of other proof we will apply in this case, we find that
217 the gross net value is approximately $24,000.00, from which must be deducted the expenses that would have been incurred by the deceased on his own account in living and supporting himself during the period of his expectancy, which would doubtless have amounted to at least fifty dollars per month, we think that the highest verdict that could be upheld on the elements of damage involved in the trial would be $16,000.00.

If the plaintiff will remit all of the judgment in excess of $16,000.00, the judgment will be affirmed; otherwise it will be reversed and remanded because of the excessive verdict.

Affirmed with remittitur.

Cook (W. H.) and Holden, J. J., being disqualified, took no part in the decision of this case.

(Endorsed on back:) Filed April 4, 1921. W. J. Buck, clerk; W. J. Brown, D. C.

Order allowing fifteen days additional time for filing suggestion of error.

Minutes of Supreme Court of Mississippi, March term, 1921, Monday, April 18th, 1921.

WALKER D. HINES, AGENT, GULF & SHIP ISLAND R. R. Co.,
v.
MRS. MAUD E. GREEN, ADMINISTRATRIX. } 21567.

Ordered that fifteen days' additional time be allowed in which to file suggestion of error.

Suggestion of error.

In the Supreme Court of Mississippi.

WALKER D. HINES, AGENT, GULF & SHIP ISLAND R. R. Co.,
v.
MRS. MAUDE E. GREEN, ADMINISTRATRIX. } No. 21567.

218 SUGGESTION OF ERROR.

Counsel for appellant dislikes to annoy this honorable court with criticisms of its opinions in the shape of suggestions of error, and ordinarily, on account of our great respect for its wisdom and impartiality, accepts its conclusions as justly and definitely determining the issues presented.

In the instant case, however, it is felt that a misapprehension has possessed the minds of the court as to the prejudicial character of the errors assigned, and that the court was of the opinion that, in any view, justice had been done or that there was no reasonable ground to suppose a different result would follow upon a remand of the cause for a new hearing. All this is said with full knowledge of the reasons assigned in writing in the judgment of partial affirmance, or rather an affirmance with a remittitur.

This honorable court is earnestly requested to reconsider whatever views it may have entertained, and especially those expressed in its former written opinion, and to note particularly that the plaintiff's intestate had voluntarily sought out and accepted a position or place in which to work over the advice and objection of defendant at a time when he had full knowledge of whatever vicious, quarrelsome, or violent habits the evidence may have shown that his fellow servant McLendon was afflicted with, manifestly knowing more about *his* temper and disposition than the defendant could possibly have known. For if after working with the said McLendon for several years, as the proof shows he did do, he had not discovered any dangerous or vicious conduct in his life, then how could the defendant be charged with knowledge of any dangerous or vicious habits possessed by said McLendon. On the other hand if he did know of said vicious
219 habits of the said McLendon, if indeed the proof shows him to have been that character of man, then we must insist and repeat that under the Federal employers' liability act, the deceased assumed the risk incident to working with the said McLendon, and under that act the master could not be held liable. And the learned court below tried the case on the theory that the Federal employers' liability act applied and the issue was submitted to the jury upon that theory that this learned court in its written opinion, as we read it, clearly announces that the Federal employers' liability act had no application and that the learned court below erred in trying it under

that act, and we submit that if that be true the case ought to be reversed and remanded and let it be tried upon the proper theory. We contend that if the court below tried the case under the wrong theory and controlled it by the wrong principle of law, that that error can not be cured by simply assessing the right amount of damages as the result of a trial that was tried wrongfully upon its merits.

We have not the record before us at this time, but having read the record several times and noting at the bottom of the first page of the opinion where the opinion recites that the declaration charges "That at the time of the injury the deceased and the engineer were engaged in the business of the master *and in furtherance of the master's business*," we can not help but feel that the court is mistaken in the opinion about the declaration charging in any count that whatever was done "*in furtherance of the master's business*" *and* it was necessary to charge that, but even if it was charged we contend that the killing of the deceased by the engineer could not in any way have been in furtherance of the master's business, but on the contrary the logical result was to obstruct and delay the master's business; to illustrate the point suppose that a man was em-
220 ployed to catch a fox or some other animal and in doing so the master had furnished him with foxhounds for the purpose of chasing them down, and he should suddenly draw from his pocket a revolver and go to shooting down the dogs, could it be said that he was then engaged in furtherance of the business that he was employed to carry on; on the contrary would not he be engaged in obstructing the business that he was employed to pursue? Now, in the instant case the engineer was employed to operate the locomotive; this he could only do by remaining in the cab and operating the throttle, and no matter how much delay deceased might have caused in coming to open the switch, by shooting him to death the engineer in no way could he be acting in the furtherance of his master's business; neither was this any part of the business he was employed to do; so we respectfully urge upon this court, that the declaration does not sufficiently charge that at the time of this killing the engineer and deceased *were engaged in the furtherance of the master's business*, nor does the proof sustain such charge, if it was sufficiently made.

We beg to call the court's attention to another conclusion, stated in the opinion at the top of page three, to the effect that the engineer "accosted deceased with the remark 'Why in the hell haven't you thrown the switch?'" and the only person who was produced at the trial who heard this remark was engaged in working on some cars near the point and passed around the car in his work, and in a few minutes heard the pistol shots. We submit that this is the only evidence that attempts to tell what passed between the engineer and the deceased a few minutes before the shooting, and we further submit that that testimony is insufficient upon which to base the conclusion that the engineer killed the deceased in furtherance of the master's business. The court don't know, and the record doesn't show what

the actual killing may have occurred about, and the burden is upon the plaintiff to prove this clearly and not by mere suspicion
221 before the court would be justified to force from the defendant $16,000.00 to be handed over to the plaintiff as the final judgment in this cause.

We feel constrained to criticize the opinion of this court as it appears near the bottom of the fourth page, wherein it is stated "that McLendon, the engineer, would not obey the signals." Our recollection of the record is that all the testimony shows that McLendon would obey signals and would not disobey signals when they were given in keeping with the rules of the company and the law, but that he would not violate the law nor disobey the rules of the company. It is also stated in the same paragraph that "it also appeared in evidence that Green had reported McLendon for having violated his duties on a number of occasions." We think that the record does not support this conclusion. Our recollection of the record is that Green had never reported McLendon to any officer authorized to act, in which Green charged him with any failure to perform his duties. We are also unable to find from the record any testimony to support the conclusion that the engineer had several times tried to catch Green between the cars and then move his engine so as to injure him.

The opinion states that the record shows that the engineer's general reputation in that community was that of a dangerous, quarrelsome, and violent man. We most respectfully submit that there is no evidence in the record as to the general reputation of the engineer in the community in which he lived. It is true that the plaintiff's counsel after having sought to prove the reputation of the engineer among the employees with whom he worked, did offer to prove the general reputation of the engineer in the community in which he lived, to which an objection was interposed and which was by the court sustained.

222 Respecting the peremptory charge given by the court below that the case must be tried under the Federal employers' liability act, which this court manifestly declares was error, can it be said to be a harmless error, and that the error is cured by this court assessing the damages in accordance with the same wrong theory of trial? Would it not be better to reverse and remand the case and let it be tried on what this court holds to be the correct theory, rather than to allow the plaintiff to retain a part of the fruits of a victory obtained upon a wrong theory? This court correctly states in its opinion that "under the Federal employers' liability act the doctrine of the assumption of risk applies where the servant injured knew and appreciated the risk and voluntarily continued in the employment after such knowledge, without promise on the part of the master to remedy the condition." And the undisputed testimony in the record shows that, whatever danger existed, if any, myst have been known to the deceased better than any one else, and there is no evidence whatever that any promise had been made by the master to better or

change the condition. If we are correct in this view, then we submit that the only result that should be allowed to stand under that act, for manifestly the case was tried under that act, would be a clear-cut judgment for defendant.

Wherefore, for the errors suggested, this honorable court is respectfully asked to reconsider its judgment of affirmance with a remittitur, and to reverse and dismiss the judgment appealed from, or at least it should be reversed and remanded for a new trial on the correct theory in the court below.

Respectfully submitted by—

TALLY & MASON,
T. J. WILLIS and B. E. EATON,
Counsel for appellant.

(Endorsed:) Filed May 2, 1921. W. J. Buck, clerk, by W. J. Brown, D. C.

223 *Order overruling suggestion of error.*

Minutes Supreme Court of Mississippi, March term, 1921, Monday May 9th, 1921.

WALKER D. HINES, AGENT, GULF & SHIP ISLAND R. R. Co.
v.
MRS. MAUDE E. GREEN, ADMINISTRATRIX. } No. 21567

This cause coming on to be heard on the suggestion of error filed herein and this court having sufficiently considered the same, doth order and adjudge that said suggestion of error be, and the same is hereby, overruled.

224 STATE OF MISSISSIPPI,
Hinds County.

I, W. J. Buck, clerk of the Supreme Court of the State of Mississippi, being the court of said State which has highest, last, and final jurisdiction of all pleas and causes pending in the courts of said State, do hereby certify that the foregoing are full, true, and correct copies of all the papers, each and all of them constituting the record in the said Supreme Court of the State of Mississippi in the case of Walker D. Hines, Agent & Director General of R. Rs. (Gulf & Ship Island Railroad Co.) *v.* Mrs. Maude E. Green, administratrix, No. 21,567 on the docket of said court all of which are now on file in my office, and taken together constitute the record in said cause.

Given under my hand and the seal of said court affixed at offices in the city of Jackson, Mississippi, this the twenty-fifth day of July, 1921.

[SEAL.]

W. J. BUCK,
Clerk Supreme Court of Mississippi.

(Endorsed on cover:) File No. 28,394. Mississippi Supreme Court. Term No. 439. James C. Davis, Director General of Railroads and agent under section 206 of Transportation act of 1920, petitioner, *vs.* Mrs. Maude E. Green, Administratrix of the estate of Jesse Green, deceased. Petition for writ of certiorari and exhibit thereto, with notice and proof of service. Filed July 29th, 1921. File No. 28394.

145 United States of America, ss:

The President of the United States of America to the honorable the judges of the Supreme Court of the State of Mississippi,

Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, Director General of Railroads, and agent under section 206 of transportation act of 1920, is appellant, and Mrs. Maude E. Green, administratrix of the estate of Jesse Green, deceased, is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Forrest County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of
146 the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

JACKSON, MISS., *Nov. 2nd, 1921.*

The within writ of certiorari is answered by attaching hereto stipulation of counsel for appellant and appellee for the use of the transcript filed on petition for certiorari and now on file in the Supreme Court of the United States.

[SEAL.] W. J. BUCK,
Clerk of the Supreme Court of Miss.

[Indorsed: File No. 28,204. Supreme Court of the United States, No. 439, October term, 1921. James C. Davis, Director General of Railroads, etc., vs. Mrs. Maude E. Green, administratrix, etc. Writ of certiorari.]

147 JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, etc.,
vs.
MRS. MAUDE E. GREEN, ADMINISTRATRIX, ETC. } No. 439.

In the above cause, record of which was filed in the Supreme Court of the United States, with the petition for a writ of certiorari, and the Supreme Court of the United States having issued a writ of certiorari to the clerk of the Supreme Court of Mississippi re-

quiring him to certify the record in said cause to said Supreme Court of the United States:

It is hereby stipulated and agreed by counsel for appellant and appellee that the printed record as certified to the Supreme Court of the United States by the clerk of the Supreme Court of Mississippi on petition for writ of certiorari can be taken as a return to said writ of certiorari issued in said above styled cause.

STATE OF MISSISSIPPI,
Hinds County:

I, W. J. Buck, clerk of the Supreme Court of the State of Mississippi, hereby certify that the above and foregoing is a true and correct copy of the stipulation by counsel for appellant and appellee in the cause of Jas. C. Davis, Director General of Railroads, etc. (439) in the Supreme Court of the United States, No. 21567 on the docket of the Supreme Court of Mississippi, said stipulation being filed in my office the 2nd day of November, 1921.

Witness my hand and the seal of said court at offices in the Capitol in the City of Jackson, Mississippi, this the 2nd day of November, 1921.

[SEAL.] W. J. BUCK,
Clerk of the Supreme Court of Mississippi.

148 [Indorsed:] File No. 28394. Supreme Court U. S. October Term, 1921. Term No. 439. James C. Davis, Director General, etc., petitioner, *vs.* Mrs. Maude E. Green, adm'x, etc. Writ of certiorari and return. Filed Nov. 5, 1921.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 439.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, &C., PETITIONER,

vs.

MRS. MAUDE E. GREEN, ADMINISTRATRIX, &C.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

B. E. EATON,
T. J. WILLS,
Counsel for petitioner.

CITATIONS.

	Original.	Print.
Boldt *vs.* Pa. R. R. Co	21	15
C., R. I. & P. R. R. Co. *vs.* Ward	21	15
Chesapeake & Ohio R. R. Co. *vs.* Profit	21	15
Erie R. R. Co. *vs.* Collins	20	15
Erie R. R. Co. *vs.* Szary	20	15
I. C. R. R. Co. *vs.* Porter	20	15
Kinzell *vs.* C., M. & St. P. R. R. Co	20	15
Osborn *vs.* Gray	19	14
Philadelphia & R. R. R. Co. *vs.* Pope	19	14
Philadelphia, B. & W. R. R. Co. *vs.* Smith	20	15
Philadelphia & R. R. R. Co. *vs.* Dr. Donato	20	15
Roebuck *vs.* A., T. & S. F. R. R. Co	21	16
Roberts Federal Liability of Carriers	21	15
Southern R. R. Co. *vs.* Lloyd	19	14
Southern Pac. R. R. Co. *vs.* Industrial Accident Co	20	15

1 IN THE SUPREME COURT OF THE UNITED STATES.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, PETITIONER,
vs.
MRS. MAUD E. GREEN, ADMINISTRATRIX, RESPONDENT.

October term, 1921.

Petition for writ of certiorari.

To the Honorable Supreme Court of the United States:

1. The petition of James C. Davis, Director General of Railroads and agent, under section 206 of the transportation act of 1920, respectfully shows this honorable court that he is the successor of the director general operating the railroads of the United States under the control of the director general by appointment of the President of the United States, under the authority of the United States Government, to take over and operate said railroad during the war, the said operation extending from December 27, 1917, to March 1, 1920.

2. That on the 5th day of August, 1918, the United States Railroad Administration was operating the Gulf and Ship Island Railroad under and by virtue of the acts of Congress and the proclamation of the President of the United States heretofore referred to.

3. That on the date afore mentioned, there was a switching crew in the employment of the United States Railroad Administration and operating as a switching crew in the city of Hattiesburg on and over the Gulf and Ship Island Railroad. Zack McLendon was engineer and Jesse Green engine foreman or conductor on the aforesaid switching crew. This crew operated from eight o'clock a. m. till four o'clock p. m. Their duties were the switching of cars, the making up of trains, and such other movements of the rolling stock used
2 on the railroad as was necessary to be handled in the yards of Hattiesburg, Mississippi.

4. On the date afore mentioned, at about nine o'clock a. m. this switching crew was moving three passenger coaches, a gondola, and coal hoist from the north end of the Hattiesburg yards to the south end. The three coaches were used exclusively for the movement of soldiers to and from Camp Shelby, located a few miles south of Hattiesburg. The soldiers thus being moved were traveling in interstate commerce. When moving in, they came from Indiana, West Virginia, and Kentucky, and when moving out, they were destined for the Atlantic seaboard for transportation to the battle front in France. In the movement they moved upon through tickets, both in and out of Hattiesburg, over the Gulf and Ship Island Railroad. The three cars so used for the purpose of transporting these soldiers had been set apart and designated for this particular use. On the morning of the day above referred to, these cars had come into Hattiesburg loaded with soldiers, and at the time of the

tragedy out of which this action grew they were being moved to the south yards to be placed on a side track, and there to be cleaned and prepared for use in the next movement of soldiers under the direction of the commanding officer. The coal hoist, which was used in coaling engines engaged in interstate commerce, was being moved at this time to the south yards, there to be repaired, after which it was to be carried to Jackson, Mississippi, and used in coaling the engines moving freight and passengers in interstate commerce.

5. On the morning of August 5, 1918, at about nine o'clock a. m., while switching the cars, as hereinbefore detailed, the engineer, McLendon, because of some real or fancied grievance, took a hammer and knocked the flagman on the front end of the train off and injured him to such extent that it was necessary for him to be carried to the hospital. The train then proceeded south until it reached the side track where it was necessary for the switch to be thrown in order for the train to go in on the side track and leave the cars to be cleaned. When the train reached the side track, the con-
3 ductor, Jesse Green, got off of the coach a few car lengths behind the engine and walked down for the purpose of throwing the switch. The engineer, McLendon, got off of his engine on the ground, and when Green came up, entered into a controversy with him. In the altercation that ensued, McLendon shot Green and killed him.

6. On the 3rd day of October, 1919, Mrs. Maud E. Green and her four children filed suit against the Railroad Administration to recover for the death of the said Jesse Green in the sum of fifty thousand ($50,000.00) dollars. The defendant filed the plea of general issue and special pleas, setting up that the master and the deceased conductor and engineer were engaged in interstate commerce at the time of the difficulty which resulted in the death of Jesse Green. Assumption of risk was pleaded also. To these pleas demurrers were filed and by the court overruled. The plaintiffs then had the cause of action continued, and on the 5th day of December, 1919, sued out letters of administration of the estate of Jesse Green, deceased, and had Mrs. Maud E. Green appointed administratrix. On the same day action was begun in the circuit court of Forrest County, Mississippi, against the Railroad Administration by the said administratrix for the death of the said Jesse Green under the Federal employers' liability act. To this declaration so filed a plea of general issue was filed, and special pleas in bar were filed setting up assumption of risk as a defense under the Federal employers' liability act. A second plea was filed setting up that the deceased had selected the fellow servant with whom to work, over the objection of the master, and therefore the master was not liable. The pleas set forth and the proof showed that in 1916 the railway conductors and trainmen went out on a strike. In the settlement of the strike there was a contract in which, among other things, it was provided that a rule of seniority should prevail in the selection of positions to be occupied by the train crew. Green, the deceased,

and McLendon, the engineer, had worked together previous to the consummation of this contract, but because of their inability to get along together they had been separated by the master. After the agreement was made between the master and the employees
4 Green demanded to be put back on the day run with McLendon. The master refused to comply with this demand by putting him back. Green then appealed to the brotherhood, and it, through its officers, compelled the master to put him back on the run. The plea set up that Green had thereby selected his fellow servant over the protest of the master, and the master owed him no duty as to this fellow servant unless his attention was called to some vicious trait of character, which had not been done. Replications were filed to the pleas, traversing the special matter pleaded. This declaration was filed on the theory that they were engaged in interstate commerce and the pleas admitted it, so that proof of interstate character of the service was obviated.

7. The two declarations so filed were consolidated. The cause of action was then tried out on the theory that they were engaged in interstate commerce. The defendant defended on the theory that the engineer and conductor at the time of the difficulty were not engaged in and about their master's business. It sought to have the court exclude the evidence on that theory at the conclusion of the plaintiff's case, and asked for a peremptory instruction for the defendant at the conclusion of the testimony of the whole case. The court refused these instructions upon the theory that the deceased and the engineer were engaged in and about their master's business. The case was tried on the theory that if they were engaged in and about the master's business that they were engaged in interstate commerce. The pleading made no issue on this fact. The proof showed that they were so engaged in interstate commerce, and the proof being uncontroverted, the court adopted the theory and so charged the jury. The court charged the jury in the following language:

"The court charges the jury for the defendant that Engineer Zack McLendon and the deceased Jesse Green were engaged in interstate commerce, together with the common master at the time the said engineer killed Green; and if the jury believe from the evidence in this case that the deceased Green demanded and obtained the position of engine foreman in the crew in which Engineer McLendon was working, after he had formerly worked with the said Zack McLendon and knew him and his vicious and dangerous character, if any, then the said Jesse Green assumed the risks of the dangers incident to working with the said McLendon, and in that event it would be the sworn duty of the jury to find for the defendant.

"Given.

"Filed May 8, 1920."

5 The court instructed the jury for the plaintiff:

"The court instructs the jury for the plaintiff that sound sense and public policy require that railroad companies should not be exempt from liability to their employees for injuries resulting

from the quarrelsome and vicious and dangerous character of co-employees, if any, when by the exercise of proper diligence such injuries might be avoided.

"Given.

"Filed May 8, 1921."

"The court instructs the jury for the plaintiff that if you believe from the evidence in this case that McLendon, the engineer in the yard at Hattiesburg, was of a quarrelsome, vicious, and dangerous character and disposition; and if you believe from the evidence this rendered him incompetent; and if you believe such incompetency, if any, was the proximate cause of the injury to and death of Jesse Green, and that a difficulty was wrongfully provoked by him while he was engaged in the master's business; and if you believe in such difficulty he wrongfully killed Jesse Green, then if the agents or servants of this defendant whose duty it was at the time to employ and discharge him, if unfit, did not exercise due care in the employment of McLendon; or if after he was employed they in fact knew that he was a quarrelsome, vicious, and dangerous man, then the railroad company is liable to the plaintiff for the death of said Jesse Green, and you should so find.

"Given.

"Filed May 8, 1920."

"The court instructs the jury for the plaintiff that while the burden of proof is on the plaintiff to make out her case, she is not required to make proof beyond a reasonable doubt, but all that is required is for her to make out her case to the satisfaction of the jury by a preponderance of the testimony; and if you believe from a preponderance of the testimony in the case that McLendon bore a bad reputation for peace or violence among the men at the yards where he and the other men worked, and that his foreman or superior officers knew of his reputation as such, or could have known with the exercise of ordinary care, then the defendant is liable to the plaintiff for damages, if you further believe from the testimony that he assaulted and killed Jesse Green not in self-defense while they were engaged in and about the business for the defendant.

"Given.

"Filed May 8, 1920."

The jury returned a verdict for the plaintiff in the sum of thirty-five thousand ($35,000.00) dollars. From this judgment an appeal was prosecuted to the Supreme Court of the State of Mississippi. The supreme court of the State affirmed the judgment of the lower court, with a *remittur* of nineteen thousand ($19,000.00) dollars for the death of her said intestate.

8. The court in affirming the case, after discussing the difference between the State law and the Federal law as to liability on the fact and as to measure of damages, made this statement:

6 "Measured by this testimony the facts do not bring the case within the Federal employers' liability act, for the reason that none of the things being operated and moved at the time of the injury

were being then used in interstate commerce, nor were they intended to be so used immediately upon being placed in condition for use, nor was there any fixed time or purpose for their early use so as to make them so intimately connected with interstate commerce as to be practically a part thereof."

The court said that under the Federal employers' liability act the doctrine of the assumption of risk applies where the servant injured knew and appreciated the risk and voluntarily continued in the employment after such knowledge without promise on the part of the master to remedy the condition; while under the State law, if the master is negligent, the servant does not assume the risk. The court held thereby that if the Federal law applied, there would be no liability, but that the Federal law did not apply, and therefore there was liability under the State law. This holding of the court denied the defendant a substantial right and defense that it had under the Federal law. This reversed the holding of the trial court in the instruction hereinbefore quoted.

9. The Supreme Court of the State of Mississippi, in discussing the measure of damage, used this language:

"The trial proceeded as above stated on the theory that the plaintiff was limited to elements of damage recognized by the Federal employers' liability act, and after the jury only had these elements submitted for its consideration, the verdict is excessive, and it cannot be upheld on any theory that the jury might have found elements of damage if properly instructed, which might be sustained under the elements recognized by the State law."

The court sustained the theory of the cases as to the elements of damage upon which the cause was tried in the court below. It reversed the theory upon which the cause was tried in the court below as to the liability in the case. A copy of the opinion of the Supreme Court of the State of Mississippi is hereto attached as Exhibit "A" to this petition.

10. The declaration in the case filed by the administratrix charged a working in interstate commerce. The pleas of the defendant
7 set up and admit this fact. Proof that they were engaged in interstate commerce was thereby eliminated. The proof, however, showed that these cars had been specifically set apart at Hattiesburg for the carrying of soldiers into the camp and out of the camp at Camp Shelby. These soldiers moved in interstate commerce. The preparation of the cars for use, by cleaning them, was as much an essential duty as repairs or any other service necessary for their operation. They were being moved from the point reached by the train when it passed Hattiesburg to the side track where they were to be cleaned and made ready for outbound service. The statement made by the Supreme Court of the State of Mississippi that there was nothing in evidence to show when they would be used again is not supported by the record. The record showed that they were to be used as soon as soldiers were to be moved from the camp. This fact impressed upon the cars their interstate designation. The action of

the court in holding that the master and employees, if engaged in the master's business, were not in interstate commerce, was error. The Supreme Court of Mississippi realized that it was error when they fixed the measure of damage under the interstate commerce law.

11. The final judgment was entered in this case on the 9th day of May, 1921, in the Supreme Court of the State of Mississippi. The Supreme Court of the State of Mississippi was the court of last resorts in which this cause can be reviewed except this court.

12. Wherefore, your petitioner prays that this honorable court will be pleased to grant the writ of certiorari in this case directed to the Supreme Court of the State of Mississippi to bring up this case to this court for such proceedings therein as to this court may seem just.

B. E. EATON,
T. J. WILLS,
Attorneys for Petitioner.

"ETHRIDGE, J. Mrs. Maud E. Green, the appellee, brought suit against the appellant in the circuit court for the death of her husband, an employee of the appellant, his death being brought about by an engineer in the service of the appellant killing the appellee's husband at a time when the engineer and the deceased were employed by the appellant and engaged in moving some passenger cars from one point in the yards of Hattiesburg to another point in the yards. The original declaration was filed in three counts, alleging that the engineer was an unsafe and dangerous man to be employed and with whom to work, on account of his quarrelsome, dangerous, and vicious habits and character, which were known to, or, by the exercise of reasonable diligence, ought to have been known to, the appellant.

"The appellant defended under the general issue, and filed certain special pleas. Among other pleas, it pleaded that the deceased and the engineer were at the time of the killing engaged in interstate commerce for the appellant, and that the liability of the appellant was covered by the Federal employers' liability act (U. S. Comp. St., secs. 8657–8665), and that under this act there was no liability upon the appellant for the death of the appellee's intestate. When this plea was filed by the defendant a new suit was filed by the appellee as administratrix under the Federal employers' liability act, in which the acts alleged in the other suit were declared on, and it was alleged that at the time of the injury the deceased and the engineer were engaged in the business of the master and in furtherance of the master's business, bringing the case under the Federal employers' liability act, and then, upon motion of the appellee, the two suits were consolidated by the circuit court without objection, and the case proceeded to judgment, resulting in a verdict and judgment of $35,000.00 in favor of the appellee as administratrix.

"On the trial it appeared that the deceased was a conductor of a switching crew operating in the yards at Hattiesburg, Mississippi, and that the engineer was the engineer in charge of the cars being moved from one point in the yard to another point. While the movement was being made the switchman who accompanied the crew gave the engineer a signal, which he repeated several times, and the engineer had told the switchman not to signal him but once, that he was on the watch, and would see the signal, and when the switchman signaled more than once on this occasion and remounted the running board on the engine, the engineer came down with a hammer and accosted the switchman about disobeying his admonition or instruction about the signal. The switchman, who was a negro, told the engineer that he was doing his duty as best he could under the instructions of Mr. Green, the deceased, who was foreman of the crew. Whereupon the engineer told the switchman that he would kill him and Mr. Green too, and knocked the switchman off the running board with the hammer. This resulted in certain of the crew being taken from the train to carry the switchman to the hospital. The engineer moved on to the switch, which lay along his route, and when he reached the switch it had not been thrown so as to permit him to proceed, and he stopped the engine, and Mr. Green, the conductor and foreman, proceeded from the cars being moved to the switch to throw the switch, it being his duty to do so in case the switchman was not available for that service. While he proceeded from the cars to the switch, McLendon, the engineer, came down from the engine with a pistol and took his stand near the front of the engine, and, as Green, the conductor, and foreman, came up, accosted him with the remark, "Why in the hell have you not thrown the switch?" The only person who was produced at the trial who heard this remark was engaged in working on some cars near the point and passed around the car in his work, and in a few moments hears a pistol shot. There were two or three shots fired, and when the first shot was fired other persons saw McLendon, the engineer, but did not see the deceased. McLendon refused to let any one approach the body of the deceased until he had taken an iron pin and placed it near the man and had sent for a policeman to come to the scene.

"It was in proof that some years before the killing in question the deceased and McLendon had worked together, and that they did not get along, having personal difficulties about the work. The railroad company on the application of the deceased, Green, had changed him from a day crew to a night crew, and they worked separately some eight or nine months before the killing. Prior to the killing some eight or nine months there had been a strike and in the settlement of the strike between the employees and the railroad company and separate contracts had been entered into under which the railroad company had agreed that the different brotherhoods under which its employees were organized, McLendon being a member of the Brotherhood of Engineers, and the deceased, Green, being a member

10 of the conductors' organization, which contracts gave the employees the right to select positions in the service according to the rule of seniority; that is to say, the man who had been longest in the service of the railroad company had the first right to select his service, and those who had been in the service a less time having to select from the positions available after their seniors had selected employment. After this contract was executed, Green, the deceased, applied to the railroad company for work during the daylight, that being more desirable than the night work. At first the railroad company had failed or declined to give him the promotion, but was approached by the manager of the conductor's organization, and told that Green had a right under his contract to select the position. The railroad company told Green that if he would arrange with the man in charge theretofore of the daylight work to change positions it would be all right, and the change was accordingly made. When the change was made it threw Green into the crew in which McLendon, the engineer, was working in the switching operations in the yard. The railroad company set forth by plea that Green had assumed the risk of working with McLendon by virtue of his claiming his rights under the contract, and that his administratrix could not recover because of that fact under the Federal employers' liability act. The pleadings made an issue on this proposition, and the case was submitted to the jury on instructions as to the rights of the parties bearing on the assumption of the risk, in effect telling the jury that if Green knew of McLendon's character and placed himself in association with McLendon with knowledge thereof under his contract with the railroad company, he had assumed the risk incident to working with such a dangerous man, and submitting the counter proposition that if he did not know that McLendon was a dangerous man with whom to work he would not assume the risk.

"It appears from the evidence for the plaintiff that McLendon was a contentious, disagreeable, and quarrelsome man; that he was constantly embroiled with his fellow employees in quarrels about the work; that he would not obey the signals and that he was a stickler for the rules; that he had been frequently reported to the railroad company. It also appeared that Green had reported him for violating his duties on a number of occasions. It was also in testimony for the plaintiff that he, the engineer, had several times tried to catch Green between the cars and them move his engine so as to
11 injure him. It was also in proof that he had killed a man prior to the killing of Green about some matter disconnected with the railroad business, and that the employees of the yard regarded him as a turbulent, dangerous, and violent man, and also that he had the general reputation in the community of being a dangerous, quarrelsome, and violent man.

"The first question, and the most important question, to be decided in this suit is whether or not the killing grew out of the master's business while the two men were employed about the master's business and in furtherance of the master's business, and

whether the master is liable for the death of one of its employees at the hands of another employee when not caused by the movement or the cars or physical appliances of the master, but caused by a weapon, as in the present case.

"The appellant relies principally upon the case of Hines, Director General, *v.* Cole, 85 South, 199, in which case this court held that the employers in that case were not in furtherance of the master's business, and that the quarrel in that case was the private quarrel of the parties involved in that difficulty. The character of the employee for peace and violence was bad, as here. The rule, as stated in the syllabus, is as follows:

"'The master is not liable for the wrongful assault by one servant on another unless the servant, in making the assault, was acting within the course of his employment, with a view to his master's business.'

"1. The converse of the rule is true, that if the assault is made while acting within the course of his employment, and with a view to his master's business, the master is liable, especially where he had knowledge that the servant has such a character for violence or has such a vicious disposition as to make the assault probable. Under the Cole case it is held that when the fellow-servant rule does not apply the master is responsible for an injury wrongfully inflicted by one servant on another acting within the course of his employment, with a view to his master's business, although the master was not negligent in employing such servant or in retaining him in his service.

"(2, 3). In the present case there is ample proof that the master had knowledge of the vicious disposition and violent character of the engineer who committed the assault in this case so to make him liable regardless of the rule above stated, provided, of course, that the servant was acting within the scope of his employment and with a view to his master's business. We think the rule in this State and the rule in the Federal court is the same as to this proposition, and it would be immaterial which law governed so far as this feature of the case is concerned, provided the engineer was acting within the scope of his employment and with a view to his master's business. Do the facts of this case show that the engineer and the deceased were so acting in the course of their respective employments, and with a view to the furtherance of the master's business? They were engaged in moving the master's cars and machinery from one point of the yard to another point of the yard. In order to carry the car to its destination it was necessary to pass through the switch about which the difficulty arose, and it was a fact that the switch had not been thrown and the track cleared so that the engineer could proceed to his destination that he accosted, assaulted, and killed the deceased. It was no private quarrel, but was a quarrel about the master's business, and it was because the engineer was delayed and hindered in proceeding to his destination that he was irritated, caused him to quarrel, make the

assault, and kill the deceased. It was the deceased's business to throw the switch under the circumstances that confronted the crew at the particular time, and it was his business, and he had authority to control the movement of the trains, but it was the engineer's duty to move the train, and we think it was within the scope of his power and duty to call for an explanation, where one was reasonably required as to why the switch was not thrown or as to why the track was not cleared so he could proceed to his destination. So far as the question as to whether the two men were engaged in the master's business, about the master's business, and whether the quarrel occurred and the killing resulted from this relation, the evidence amply sustains the plaintiff's contentions as to liability on this feature of the case.

"(4). Up to this point the State and Federal laws, we think, are in harmony, but questions now arise in which the rule in the two jurisdictions differs. Under the Federal employers' liability act the doctrine of the assumption of risk applies where the servant injured knew and appreciated the risk and voluntarily continued in the employment after such knowledge without promise on the part of the master to remedy the condition; while under the State
13 law, if the master is negligent, the servant does not assume the risk. There is also a difference in the elements for which damages may be allowed in the two jurisdictions. Under the State law the plaintiff will be entitled to recover the net present cash value of the expectancy, and also would be allowed to recover for damages from the loss of association, counsel, consortium, etc. While under the Federal employers' liability act the plaintiff would be limited to the monetary value, or the present value of the amount of money, they would have received for support, gifts, etc., had the deceased lived, and would not be entitled to recover for such parts of the value of the expectancy as the deceased himself would have earned, but would not have turned over to the family, and they would not be entitled to damages for loss of society, counsel, or consortium.

"The defendant by proper pleadings and by proof tending to sustain its pleadings raised the issue of the assumption of risk in working with the engineer, and the trial court peremptorily instructed the jury for the defendant that the Federal employers' liability act controlled the case, and the elements of damage involved under that law was all that was submitted to the jury for consideration, and the verdict exceeds the amount of the present value of the expectancy of the deceased. The plaintiff contended in the court below that the liability was given by the State law and contends in this court that this is true.

"In view of the difference in the rule under the State law and the rule under the Federal law it is important to determine which law governs the transaction. The switching movement in the yard which was being done at the time of the killing was a movement of certain passenger cars and a coal loader and a gong. The coal loader was being carried to the ships for repair and was not in

use by the railroad company immediately preceding the movement, nor was it placed back in the service of loading cars for several days thereafter. The passenger cars had not been used in service on the day of the injury in any movement or in any operation for the railroad company, nor were they being cleaned for immediate use, but were in fact placed in the service of the railroad company the day following the injury. These passenger coaches were used both for intrastate commerce and interstate commerce as the needs of the railroad company called them into service. The injury occurred in the forenoon, and there was no purpose to use these cars during the day of the injury, nor was there any fixed
14 or settled purpose to use them in such service at any particular time. Their use, or whether they would be used or not, depended entirely upon the circumstances which might arise and were not controlled by any circumstances then existing, nor was there any settled purpose to use them at any particular time. They were merely used when the needs of the railroad company required their use.

"The United States Supreme Court has laid down the test for determining whether the Federal employers' liability act was applicable in the following language:

"'Generally when applicability of the Federal employers' liability act is uncertain the character of the employment in relation to commerce may be adequately tested by inquiring whether at the time of the injury the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it.' Southern Pacific Co. *v.* Industrial Accident Commission, 251 U. S. 259, 263, 40 Sup. Ct. 130, 131 (64 L. Ed. 258); Pedersen *v.* Delaware, L. & W. R. Co., 229 U. S. 146, 151, 33 Sup. Ct. 648, 57 L. Ed. 1125, 1127, Ann. Cas. 1914C, 153, 3 N. C. C. A. 7791; Shanks *v.* Delaware, L. & W. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, 438, L. R. A. 1916C, 797; New York C. R. Co. *v.* Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536; Kinzell *v.* Chicago, M. & St. P. R. Co., 250 U. S. 130, 133, 39 Sup. Ct. 412, 53 L. Ed. 893, 896.

"Measured by this test, the facts do not bring the case within the Federal employers' liability act, for the reason that none of the things being operated and moved at the time of the injury were being then used in interstate commerce, nor were then intended to be so used immediately upon being placed in condition for use, nor was there any fixed time or purpose for their early use so as to make them so intimately connected with interstate commerce as to be practically a part thereof.

"There are a number of assignments of error as to instructions complained of by the appellant, but the errors, if any, are
15 favorable to the appellant, and require more facts to be found to render liability against the appellant than the law required.

"(5). There is one assignment of error, however, that is serious, and that is that the verdict is excessive. The trial proceeded, as

above stated, on the theory that the plaintiff was limited to elements of damage recognized by the Federal employers' liability act, and as the jury only had these elements submitted for its consideration, the verdict is excessive, and it can not be upheld upon any theory that the jury might have found elements of damage, if properly instructed, which might be sustained under the elements recognized by the State law. There is no theory or contention in the record or in the arguments for the allowance of punitive damages. The expectancy of the deceased was 29.62 years, and he was a healthy man both in mind and body, and was earning $5.00 per day. This would amount to $1,825.00 per year. The evidence does not contain any calculation of the expectancy, nor any tables introduced by which computation may be made according to any standard, recognized mortality tables. But, finding the present value by dividing the total expectancy, if earned, by one plus six per cent, the legal rate of interest, for the average number of years of the expectancy, which in the absence of other proof we will apply in this case, we find that the gross net value is approximately $24,0'0.00, from which must be deducted the expenses that would have been incurred by the deceased on his own account in living and supporting himself during the period of his expectancy, which would doubtless have mounted to at least $50.00 per month, and we think that the highest verdict that could be upheld on the elements of damage involved in the trial would be $16,000.00.

"If the plaintiff will remit all of the judgment in excess of $16,000.00, the judgment will be affirmed; otherwise it will be reversed and remanded because of the excessive verdict.

"Affirmed, with remittur.

"W. H. Cook and Holden, J. J., being disqualified, took no part in the decision of this case."

16 STATE OF MISSISSIPPI

Forrest County, City of Hattiesburg:

Before me, the undersigned notary public, personally appeared T. J. Wills, who first being duly sworn, says on oath that the matters and things in the foregoing petition are true and correct as therein stated, in so far as the same appears as of knowledge, and those things that are stated on information and belief or of opinion are true to the best of affiant's knowledge and belief.

T. J. WILLS.

Sworn to and subscribed before me, this, the 27 day of July, 1921.

[SEAL] (MISS) CLOTHILDE LINDSEY,
Notary Public.

17 *Brief in support of the foregoing certiorari.*

The petition for certiorari seeks to have this court review the judgment of the Supreme Court of the State of Mississippi in which that court reversed the action of the lower court in holding that the

employees were engaged with the master in interstate commerce at the time of the tragedy so as to fix the liability under the State law, and affirmed the case with a remittur applying the Federal law as to the measure of damages. It is urged that the court erred in holding that the Federal employers' liability act did not apply; that the employees and the master were not engaged in interstate commerce so as to fix liability under the State law, and at the same time hold that the measure of damages was fixed by the rules laid down by this court as the damages recoverable for death under Federal employers' liability act.

The deceased, Jesse Green, at the time of his death was engine foreman of the day switching crew in the yards of Hattiesburg. Zack McLendon was engineer of the switching crew of which Green was foreman. On the morning of August 5, 1918, this crew moved some passenger cars and other cars down the main line to the south yards in Hattiesburg and stopped at a switch that went in on a track where passenger cars were cleaned at that time. When the train stopped, the engineer got off of his engine onto the ground. The engine foreman came forward to throw the switch. An altercation ensued, in which McLendon shot and killed Green.

Suit was instituted against the defendant in the Circuit Court of Forrest County to recover for the death of the said Jesse Green. Recovery was sought under the State law. Pleas were filed denying liability. Special pleas were filed setting up that if they were engaged in the master's business that they were engaged in interstate commerce. A further plea was filed alleging that the master had separated the engine foreman and the engineer previous to the
18 date of the accident because of their inability to *to* get along together, and thereafter and prior to Green's death, Green, under certain rights given him by a contract between the railroad company and the employees, had selected to resume work with McLendon, over the master's protest, and that he thereby selected his servant with whom to work and assumed the risk of working with him. Demurrers were interposed to the special pleas. The court overruled the demurrers and the case was continued. Letters of administration were then taken out of the estate of Jesse Green, deceased, and the widow, Mrs. Maud E. Green, was appointed administratrix. Suit was then filed by her to recover under the Federal employers' liability act for the death of the deceased intestate.

Petitioner filed the plea of the general issue denying liability and special pleas setting up that if engaged in and about the master's business, the said McLendon and deceased, Green, together with the common master, were engaged in interstate commerce. That Green in selecting and forcing the master to permit him to work with McLendon had selected his own fellow servant and has assumed the risk incident to said work.

The plaintiff then filed a motion to consolidate the two suits so as to have the cause of action pending both under the Federal employers' liability act and the State law. The motion sets up this fact in

seeking to consolidate the two suits. (See R. P. 56.) The two suits were consolidated and trial was had thereunder. The plaintiff recovered a judgment for thirty-five thousand ($35,000.00) dollars.

The Gulf and Ship Island Railroad, as operated by the United States Railroad Administration, was engaged in both interstate and intrastate commerce. The declaration filed under the interstate commerce law and alleging that the employees and common master were engaged in interstate commerce was admitted to be true by the plea filed. When the declaration alleges a fact to be true and the pleas admit it, it was not necessary to introduce evidence to prove that fact, either by the plaintiff or the defendant. The burden of proof under the count or declaration setting up the Federal em-
19 ployers' liability act was on the plaintiff.

Osborn *vs.* Gray, 241 U. S. 16.

Southern Ry. Co. *vs.* Lloyd, 239 U. S. 496.

The pleas filed by the defendant in the trial of this case admitted that the employees and master were engaged in interstate commerce and relieved the plaintiff of the burden of making the proof.

The passenger coaches that were used in the train, as shown by the evidence, were set apart and specifically designated as coaches to be used in the handling of soldiers into Camp Shelby and out of Camp Shelby, moving in interstate commerce and on interstate transportation furnished by the United States Government. (See Record P. 136, P. 200 and 201.) There was no effort made by the plaintiff to show that they were not engaged in interstate commerce at the time of the killing of Green. The plaintiff and the defendant both adopted the theory set forth by the allegations of the declaration and admissions of the plea that the employment was interstate. On this theory of the case and the proof introduced the court adopted this theory of the case and peremptorily charged the jury that the employees and the common master were engaged in interstate commerce at the time of the injury. The burden was on the plaintiff to have shown that they were not engaged in interstate commerce, and thereby to have overcome the fact established by the pleadings that they were, before a recovery could have been had under the laws of the State.

Philadelphia & R. R. R. Co. *vs.* Pope, 41 Sup. Ct. Rep., p. 518.

It was error for the Supreme Court of the State of Mississippi to reverse the trial court and hold that the employees and the common master were not engaged in interstate commerce The *C*upreme Court of the State of Mississippi should have held that they were engaged in interstate commerce and that the master was not liable for the willful wrong of a fellow servant It should further have held that the deceased, Jesse Green, assumed the risk incident to his employment when, over the master's protest, he compelled the master to permit him to work with the Engineer McLendon with a full knowledge of his disposition and traits of character.

The proof shows that the passenger coaches that were being
20 moved at the time of the injury had been set apart and desig-

nated for the movement of soldiers into Camp Shelby and movement out as they came and were trained and moved forward to the battle line in France. These soldiers were being moved in interstate commerce. The evidence shows this fact. The cars on this particular occasion were being moved from the main line to the side track to be cleaned and placed in condition for the necessary movement of the soldiers. The cars were used for no other purpose. The cleaning of the cars was as much a necessity and as closely associated to the service in which they were engaged as the repair would have been.

The character of the work engaged in at the time of the injury being so closely connected with interstate commerce, it in fact became a part of interstate commerce. The cars were specifically set apart and designated for the movement of these soldiers in interstate commerce. It was an essential part of the movement of said commerce that the cars should be cleaned and prepared for the reception of passengers. It was an essential element of commerce that they should be handled off of the main line track and on to the side track where they could be cleaned. The Mississippi court said that it was not in evidence as to when they were to be next used. It is in evidence that when next used that they would be used in the movement of the soldiers in interstate commerce. The movement was for the purpose of having them prepared for that movement. This made the work so closely identified with interstate commerce as to become a part of it.

Philadelphia & R. R. R. Co. *vs.* Di Donato, 41 Sup. Ct. Rep. 516.

Southern Pacific Co. *vs.* Industrial Accident Co., 251 U. S. 259.

Erie Railroad Co. *vs.* Collins, 253 U. S. 77.

Erie Railroad Co. *vs.* Szary, 253 U. S. 86.

I. C. R. R. Co. *vs.* Porter, 249 U. S. 168.

Philadelphia, B. & W. R. R. Co. *vs.* Smith, 250 U. S. 101.

Kinzell *vs.* C., M. & St. P. R. R. Co., 250 U. S. 130.

The deceased, Jesse Green, by virtue of the contract entered into, compelled the master to place him to work with the engineer, Zack McLendon. He knew the character and temperament of McLendon. With this knowledge he continued to work with him. He assumed all of the risk of dangers incident to his so working.

Chesapeake & Ohio R. R. Co. *vs.* Profit, 241 U. S. 462.

Boldt *vs.* Pa. R. R. Co., 245 U. S. 441.

Chi., R. I. & P. R. R. Co. *vs.* Ward, 252 U. S. 18.

Under the common law as administered by the Federal court, the master is not liable for the willful act of one servant resulting in injury to another. In Roberts' Federal Liability of Carriers, vol. 1, sec. 552, it is said:

"WILLFUL WRONGS NOT WITHIN TERMS OF THE ACT.—By its terms the national act is limited to negligent acts of a common carrier. Under well-known principles of law, injuries caused by the willful or inten-

tional acts of another are not within the terms of the statute, for, as quaintly said by one jurist, 'when willfulness comes in at the door negligence goes out through the window.' Most statutes, giving rights of action for death, define the wrongful act as the 'wrongful act, neglect, or default of another' which would include intentional wrongs; but the Federal act, for some reason, had confined the wrongful acts for which a recovery can be had, to those which are due to negligence solely. A willful assault of one employee upon another would be beyond the terms of the statute."

See Roebuck *vs.* A., T. & S. F. R. Co., L. R. A. 1917 E, 741.

Respectfully submitted.

B. E. EATON,
T. J. WILLS,
Attorneys for Petitioner.

22 In the Supreme Court of the United States of America.

In the matter of the petition of James C. Davis, Director General of Railroads and agent under section 206 of the transportation act of 1920, for writ of certiorari directed to the Supreme Court of Mississippi to bring before the Supreme Court of the United States the case of James C. Davis, Director General of Railroads and agent, under section 206 of the transportation act of 1920, *vs.* Mrs. Maud E. Green, administratrix, and now comes the petitioner herein, James C. Davis, Director General of Railroads, and agent, under section 260 of the transportation act of 1920, by its attorney, and moves the court upon a certified copy of the transcript of the record herein, and upon the annexed petition duly sworn to for writ of certiorari directed to the Supreme Court of the State of Mississippi to bring before this Honorable Court the case of James C. Davis, Director General of Railroads and agent, under section 206 of the transportation act of 1920, *vs.* Mrs. Maud E. Green, administratrix, recently decided by the Supreme Court of Mississippi for such proceedings therein as this court may seem just, and for such other and further relief as the court may deem the petitioner entitled.

B. E. EATON,
T. J. WILLS,
Attorneys for Petitioner.

23 In the Supreme Court of the United States of America.

In the matter of the petition of James C. Davis, Director General of Railroads and agent, under section 206 of the transportation act of 1920, for writ of certiorari directed to the Supreme Court of the State of Mississippi to bring before the Supreme Court of the United States the case of James C. Davis, Director General of Railroads and agent, under section 206 of the transportation act of 1920, *vs.* Mrs. Maud E. Green, administratrix:

SIRS: Please take notice that upon a certified copy of the transcript of the record herein, and upon the annexed petition and the brief accompanying it by or on behalf of the petitioner herein, and duly sworn to, I shall move the motion hereto annexed before the Supreme Court of the United States at the Capitol in the city of Washington, District of Columbia, on Monday, the 3rd of October, 1921, at the opening of the court on that day or as soon thereafter as counsel can be heard, and I shall then and there move the court for further relief in the premises as may be just.

Witness my hand this the 27th day of July, 1921.

B. E. EATON,
T. J. WILLS,
Attorneys for Petitioner.

To E. L. DENT, Esq.,
Collins, Mississippi.
CURRIE & CURRIE,
Hattiesburg, Mississippi.
J. W. CASSIDY, Esq.,
Brookhaven, Mississippi.
Attorneys for Mrs. Maud E. Green, Administratrix.

24 In the Supreme Court of the United States of America.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT, under Section 206 of the Transportation Act of 1920, Petitioner,
vs.
MRS. MAUD E. GREEN, ADMINISTRATRIX, RESPONDENT.

I acknowledge receipt of copies of the above and foregoing petition and brief, motion, and notice, all of which have this day been delivered to me this the 27th day of July, 1921.

J. W. CASSIDY,
E. L. DENT,
CURRIE & CURRIE,
Attorneys for Respondent.

(Stamped on cover:) Office of the Clerk. Received July 29, 1921, Supreme Court, U. S.

○

Office Supreme Court, U.
FILED
OCT 3 1921
JAMES D. MAHER
CLERK

No. [redacted]132

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, Petitioner,

vs.

MRS. MAUD E. GREEN, ADMINISTRATRIX, Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO MOTION AND PETITION FOR CERTIORARI.

Attorney for Respondent.

E. L. DENT,
CURRIE & CURRIE and
J. W. CASSIDY,
Of Counsel.

SUBJECT INDEX

PAGE

Syllabus 2

Index—Table of cases cited 3

Statement of case 5

No Federal question involved 6

Petitioners statement not supported by record ..... 7 & 8

All evidence refutes statement of fact by petitioner as to use and movement of cars in its yards 9-17

Pleadings amended and consolidated so as to maintain action under State or Federal Laws 18

Petitioner in error in stating case was tried on theory that parties were engaged in interstate commerce 21

Petitioner pleaded Federal Act. Burden of proof on petitioner to show that employees were engaged in interstate commerce 22

No Federal question involved in award of damages 22

Argument 23

No error in record of the trial court whether cause of action is controlled by State or Federal court 33

SYLLABUS.

I. Statement of Petitioner not based on facts and evidence contained in record and is wholly at variance with findings of fact by Mississippi Supreme Court.

II. No Federal question involved. Employees not engaged in interstate commerce. Case not governed or controlled by Federal Employers' Liability Act.

III. Petitioner's statement not supported by the Record.

IV. Evidence of Petitioner's witnesses refutes Petitioner's statement of fact as to use and movements of cars in its yards.

V. Petitioner in error when it charges that pleadings of Respondent invokes Federal Employers' Liability Act. Pleadings amended and consolidated so as to maintain action under either the State or Federal Law.

VI. Petitioner in error in stating case was tried on theory that parties were engaged in interstate commerce.

VII. Petitioner pleaded Federal Employers' Liability Act. Burden of proof on it to show that Employees were engaged in interstate commerce. Proof does not establish this fact and Federal Act does not apply.

VIII. The question as to the amount and award of damages involves only question of fact and is not open to consideration by this Court.

IX. No error in record whether case governed and controlled by State or Federal law. Petitioner obtained more favorable announcements of law in trial court than it should have received. Writ sought should be denied.

INDEX—TABLE OF CASES

Page

Allen v. Alleghany Co., 196 U. S. 458, 49 L. Ed. 554 ... 26
A. G. S. R. R. Co. v. Shotzy, 71 So. 335 ... 30
Allen v. South. R. R. Co., 173 U. S. 479, 43 L. Ed. 775 ... 27
Bartlett v. Lockwood, 160 U. S. 357, 40 L. Ed. 445 ... 29
Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. Ed. 953 ... 29
Chicago, B. & Q. R. R. Co. v. Herrington, 241 U. S. 177 ... 31
Christman v. Miller, 197 U. S. 313 ... 29
Clark v. Erie R. R. Co., 230 Fed. 478 ... 30
Dower v. Richard, 151 U. S. 658, 38 L. Ed. 305 ... 29
Erie R. C. v. Welsh, 242 U. S. 303, 61 L. Ed. 319 ... 30
Grand Rapids & I. R. R. Co. v. Butler, 159 U. S. 87, 40 L. Ed. 85 ... 26
Guardiner v. Bonestool, 45 L. Ed. 574 ... 29
Hines v. Green, 87 So. 649-652 ... 28
Israel v. Arthur, 152 U. S. 355, 38 L. Ed. 476 ... 29
I. C. R. R. Co. v. Benhams, 233 U. S. 473, 58 L. Ed. 1051 ... 30
Jenkins v. Neff, 186 U. S. 230, 46 L. Ed. 1140 ... 29
Johnson v. Drew, 171 U. S. 93, 43 L. Ed. 88 ... 26
Kenduk & H. Bridge Co. v. Ill., 175 U. S. 626, 42 L. Ed. 299 ... 29
Kerfoot v. Bank, 216 U. S. 201 ... 28
Minn. St. Paul R. Co. v. Winters, 242 U. S. 353 ... 32
National Foundry Works v. Oconto City Water Supply Co., 46 L. Ed. 157 ... 26
Penn. Ry. v. Donat, 239 U. S. 50, 60 L. Ed. 139 ... 31
Quimby v. Boyd, 138 U. S. 488, 32 L. Ed. 502 ... 29
Railroad Co. v. Yorkais, 238 U. S. 439 ... 31
Rankin v. Emigh, 216 U. S. 27 ... 28
Seaboard Air Line Ry. v. Kennedy, 239 U. S. 352, 60 L. Ed. 324 ... 30
Shanks v. R. R. Co., 239 U. S. 556 ... 31
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86 ... 29
Western Union Tel. Co. v. Cal. Publishing Co., 291 U. S. 92, 45 L. Ed. 765 ... 29
Roberts Injuries to Interstate Employees, Vol. 1, Section 466, page 808 ... 27
Vol. 2, Roberts Federal Liability on Carriers, Sec. 397 ... 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No.....

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, Petitioner,

vs.

MRS. MAUD E. GREEN, ADMINISTRATRIX, Respondent.

STATEMENT AND BRIEF FOR RESPONDENT.

I.

The Statement of Petitioner Not Based on Facts and Wholly at Variance With Findings of the Supreme Court of Mississippi.

We regret that we cannot submit this application for writ of certiorari on the statement of facts prepared by Petitioner. However, its statement is so utterly at variance with the facts contained in the record and the statement of facts made by the Supreme Court of Mississippi, In Banc, that we are forced to deny practically the entire statement on which it bases its application for writ of Certiorari and for relief from this Honorable Court.

II.

No Federal Question Involved—Employees Not Engaged in Interstate Commerce—Case Not Governed or Controlled by Federal Employers' Liability Act.

We respectfully submit there is no Federal question involved in this case. In considering and deciding it on the record made in the trial Court, the Supreme Court of Mississippi, Payne vs. Green, 87 Southern Reporter, page 649, held:

(a) "Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character, and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault."

(b) "Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact assaults the conductor because the switch is not thrown, so that the engine may proceed to its destination and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor."

(c) "When applicability of the Federal Employers' Liability Act (U. S. Comp. St. Secs. 8657-8665) is involved or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether, at the time of the injury, the employe was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. *The facts in this case do not bring it within this rule, as the cars being switched neither carried interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called theminto service for that purpose.*"

(d) "Under the laws of this state the servant does not assume the risk, in cases against railroad companies, where the master is negligent."

(e) "Where in a suit against a railroad company for an injury to a servant no case for punitive damages is made, and where the court instructs the jury that the rules applicable to the Federal Liability Act (U. S. Comp. St. Secs. 8657-8665) governs the amount of damages, and where the verdict is in excess of the amount of the present cash value of that part of the expectancy which they could recover under such rule, but in fact the liability is governed by state law, the verdict will not be permitted to stand, unless a remittitur is entered, reducing the amount to such sum as could stand under such rule of liability."

III.

Petitioner's Statement Not Supported by the Record.

The facts disclosed by the record compel us to deny paragraphs 4, 6, 7, 8, 9 and 10 of said petition. Petitioner in paragraph 4 of said petition, states the facts relative to use of cars being handled and their movements, as follows:

"Three coaches were used exclusively for the moving of soldiers to and from Camp Shelby, located

a few miles south of Hattiesburg. The soldiers thus being moved were traveling in interstate commerce. When moving in they came from Indiana, West Virginia, Kentucky and when moving out they were destined for the Atlantic Seaboard Transportation to the battle front in France. In the movement they moved upon through tickets in and out of Hattiesburg over the G. & S. I. Railroad. The three cars so used for the purpose of transporting these soldiers had been set apart and designated for this particular use. On the morning of the day above referred to, these cars had come into Hattiesburg loaded with soldiers and at the time of the tragedy out of which this action grew, they were being moved to the south yard to be placed on a side track and there to be cleaned and prepared for use in the movement of soldiers under the direction of the commanding officer. The coal hoist moved at this time to the south yards, there to be repaired, from which it was to be carried to Jackson, Mississippi, and used in coaling the engines moving freight and passengers in interstate commerce."

We respectfully submit that there is no evidence in the record to support this statement. This being true, there is nothing on which Petitioner can base its claim for the writ it seeks to invoke.

The Mississippi Supreme Court states the following to be the facts relating to said cars and their movements:

"The switching movement in the yard which was being done at the time of the killing was a movement of certain passenger cars and a coal loader and gon. The coal loader was being carried to the shops for repair and was not in use by the Railroad Company immediately preceding the movement, nor was it placed back in the service of loading cars for several days thereafter. The passenger cars had not been used in service on the day of the injury in any movement or on any operation for the Railroad Company, nor

were they being carried to be cleaned for immediate use, but they were in fact placed in the service of the Railroad Company the day following the injury. The passenger coaches were used both for intrastate commerce and for interstate commerce, as the needs of the Railroad Company called them into service. The injury occurred in the forenoon, and there was no purpose to use those cars during the day of the injury, nor was there any fixed or settled purpose to use them in such service at any particular time. Their use, or whether they would be used or not depended entirely upon the circumstances which might arise and were not controlled by any circumstance then existing, nor was there any settled purpose to use them at any particular time. They were merely used when the needs of the Railroad Company required their use."

The Court will observe that there is a marked difference between the statement of facts by Petitioner with reference to the use and movement of cars, and that of the Mississippi Supreme Court.

IV.

Evidence of Petitioner's Witnesses Refutes Its Statement of Fact as to Use and Movements of Cars in Its Yards.

The first witness of Petitioner who testified as to the use and movement of the cars being switched in the yards was John Gainy, a regular brakeman. He was asked:

Q. What cars did you have that morning?
A. I did not take the numbers.
Q. Did you have two or three coaches?
A. When we were going to the south yards?
Q. Yes?
A. Yes.
Q. And were not those particular coaches used to move soldiers to and from Camp Shelby?

A. I don't know what they were used for, put them on that evening and then going to Jackson and bringing them back.

Q. Loaded with soldiers and nothing else—were not used for general passengers, were they?

A. I can't tell you.

Q. They were not used for general passengers from Hattiesburg to Gulfport?

A. No, from Hattiesburg to Jackson (R. p. 135).

"Q. What cars did you have that morning? ried to Jackson and loaded them and brought back the next evening?

A. Yes.

Q. That is true is it not?

A. Yes, sir.

Q. They were not used for any other purpose except to make those trips?

A. I don't know.

Q. So far as you know?

A. Yes.

Q. You had been handling them day in and day out?

A. Saturday evening.

Q. For how long a time?

A. Ever since the Camp was here.

Q. At this particular time you were taking them to the place where the cars were cleaned?

A. Yes.

Q. In order to bring them back and be loaded and carried to Jackson?

Q. Didn't you know that soldiers rode in those

Q. Unloaded them here with soldiers and car-cars when they left here and went to Jackson?

A. Yes, sir.

Q. That is what they were used for?

A. I don't know who they loaded in them; I would be off duty when they were used

Q. But you understood and knew they were the trains the soldiers were carried in did you not?

A. Yes, I reckon they hauled soldiers.

Q. You knew that the coaches were set out and stood there until they were loaded the next Saturday night?

A. Yes.

Q. And were not used for anything except for that trip to Jackson on Saturday night?

A. We used so many—sometimes we would have to put coaches on other trains—

Q. You did not use those coaches down there except to haul the soldiers with? (R. p. 136.)

A. I don't know whether they loaded soldiers cars or not.

Q. But you did not use the coaches you kept down there and handled every Saturday night and Sunday except to haul the soldiers from the Camp to Jackson in did you?

A. I don''t know whether they loaded soldiers in them or not—I want to tell the truth if I can.

Q. Were the regular passenger trains made up do you know—were they made up here, Jackson, Gulfport, or where?

A. We did not make up any regular passenger trains here—no more than one or two—

Q. Don't you know that one makes up and starts at Jackson and Gulfport and passes here and all you did was to put coaches on here?

A. Yes.

Q. And those coaches were put on when they got here and loaded and for the purpose of carrying soldiers?

A. No answer.''

It will thus be observed that this witness was without information entirely on the subject of the movements of the cars and knew nothing further than that simple fact that he was engaged in switching the cars in the yards when this tragedy occurred.

The next witness who testified on this subject was Mr. Jacobs, (record pages 191-195), from which we quote:

"Q. As derrick engineer do you keep a book in which you keep records of the coal and other things you use?

A. Yes, I usually keep that.

Q. When you went up to the switch engine did you make a record of the cars and of the rolling stock being handled by the engine at that time

A. When the sheriff got there they pulled the engine and cars on down in the yard and as they passed me I put the numbers down.

Q. What was that engine pulling?

A. Four coaches and coal hoist and a gon.

Q. What is that coal hoist—where was it being moved to

A. From the Southern yard back home to the G. & S. I. shops.

Q. Do you know how it came to be in the Southern's yards?

A. They had borrowed it.

Q. You say it was being moved back home for what purpose?

A. I don't know.

Q. What was it used for when it got back?

A. They put it in the shop and repaired it and sent to Jackson.

Q. That was used for what purpose?

A. Handling coal.

Q. Tell the jury how it handles coal?

A. It has a big dipper and we pick coal from the chute and throw it in and load the cars and engine with it.

Q. What engine did you load with that hoist?

A. All of them.

Q. All of the engines?

A. At that time we were using another at the shops, but that coal hoist had been to the Southern—but was the same kind.

Q. I am talking about this particular coal hoist when it was taken to the shops and repaired and was —sent where? (R. p. 192.)

A. Jackson.

Q. For what purpose?

A. To coal engines.

Q. What engines was there to coal?

A. G. & S. I.

Q. And those engines were used for what purpose?

A. Freight and passenger and switch engine service.

Q. What passenger coaches were in that train?

A. As I walked down the train as they roll by I take the numbers of the coaches; the coach next to the engine was No. 20 and the second coach from the engine was No. 22, next one was No. 13 and next one No. 12.

Q. Was there anything else in that train other than the coal hoist and four coaches.

A. And the gon.

Q. What is the gon; do you know what that gon was?

A. No, sir—I had the number, it is torn out of my book. I put it down on that date and I see it is torn out.

Q. When did you make that record in that book of those coaches?

A. About thirty minutes after the killing.

Q. That book been in your possession ever since?

A. Yes.

Cross Examination.

Q. This coal hoist that you talk about, I understand it was not in service at all at the time the shooting occurred—had been borrowed by what road?

A. The Southern.

Q. Am I right in repeating that you stated it was not in service at all?

A. Not at that time.

Q. The Southern had another coal hoist it was using? (R. p. 193.)

A. They had been using it.

Q. But they had another they were using at this time?

A. Not that I know of.

Q. Didn't you say they had another?

A. The G. & S. I. had another.

Q. They had another coal hoist they were using and this so far as the G. & S. I. was concerned had been out of service some time?

A. Yes.

Q. And had not yet been returned to service?

A. Yes.

Q. The Company finally decided it would send this coal hoist to Jackson after repairing it?

A. It went up that week.

Q. After it went to Jackson did you say it was used in loading coal on the cars, etc?

A. Yes, sir.

Re Direct Examination.

Q. You were asked if the coal hoist was in service—where was it being carried at the time?

A. It was put in the local next to the caboose and went north and sometime after that I was there and—

Q. Where was it being carried with that engine?

A. From the Southern's yard to the shops.

Q. Why to the shops?

A. I don't know, but they required it before it went up to Jackson.

Q. After they carried it to the shops what did they do with it?

A. Repaired it.

Q. And after being repaired what happened to it?

A. Sent it up the road.

Q. And you saw it at what point?

A. Jackson. (R. p. 194.)

Q. What did you see it doing at Jackson?

A. Coaling engines." (R. p. 195.)

The third and last witness on this subject was Mr. W. L. Oakley, whose testimony we quote in full. (R. pp. 198-201.)

"Q. Your name is W. L. Oakley?

A. Yes, sir.

Q. What position do you occupy?

A. Chief Dispatcher, G. & S. I.

Q. How long have you been Chief Dispatcher?

A. Since March 13, 1917—the last time.

Q. I will ask you if you have a record of coaches No. 20, 22, 13 and 12 and their movement, and for what purpose they were used?

A. Yes, we have a record in the office showing these coaches; the train they operated on, and for what purpose used.

Q. Do you know coaches M. D. K. and for what purpose they were used about August 5, 1918?

A. Yes, if I know the numbers.

Q. Take coaches No. 20, 12, 13 and 22?

A. Used on regular line—coaches operated on all rails using the G. & S. I. R. R. for any passenger business that they may be called upon to transport.

Q. They, then operated in the regular trains and regularly used for transportation?

A. They were used as regular cars or extra cars either as the occasion required.

Q. Have you the record with you? (R. p. 198.)

A. No, sir, did not bring any records with me—the train sheets are at the office.

Q. Take coaches No. 12, 13 and 20, what were they used for on the day preceding August 5th, 1918, and for what purpose were they used on August 4, and on August 6th, 1918?

A. They were used for the regular passenger service of the G. & S. I. R. R.

Q. In the regular passenger service what passengers were carried from Hattiesburg on August 4 and 6, 1918?

A. I would say that the cars were used in the regular passenger travel of the G. & S. I. R. R. as to dates, some of the passengers went to G. & S. I. points and possibly some went beyond the G. & S. I. R. R.

A. I will state that some of the passengers went to G. & S. I. points and some went beyond the G. & S. I. points.

Q. I will ask you to state whether or not those coaches were used regularly in transporting interstate passengers over the G. & S. I.?

A. Yes, they were used on the railroad for transporting all kinds of travel.

Q. What was located here with respect to the concentration of interstate passengers?

A. I don't understand.

Q. Was there any occasion at the time for the handling of interstate passengers other than the ordinary time?

A. During that period we enjoyed a Camp and we kept our extra equipment here for emergencies which would arise from time to time.

Q. Those coaches being left here and it is in evidence they were being carried down at the time to be cleaned and prepared to go back in service—

were put in service to accommodate what passenger demand? (R. p. 199.)

A. Any passenger demand that the railroad might be called upon to handle.

Q. What would be the occasion of extra passenger coaches being handled from Hattiesburg at that time?

A. Because of the Camp—bringing in a vast number of people here and it required more than the regular coaches on the train at the time to carry the people who presented themselves for transportation.

Q. Do you mean soldiers?

A. Not exclusively,—both.

Q. Did you handle soldiers at that time in those coaches?

A. Yes, we handled both going and coming on all trains and coaches.

Q. At that time?

A. Yes.

Q. And those passengers were being transported largely from what points to Camp Shelby?

A. I can't state off hand from what points but we received a vast number from the I. C.

Q. Were those interstate passengers or intrastate passengers?

A. Some of them were interstate while others were intrastate.

Q. I will ask you if you can state, if you know, that the occasion of those coaches being left here, being the regular coaches, was for the purpose of handling the interstate passengers, being the soldiers headed at Camp Shelby, in bringing them in and carrying them back?

A. That is what we kept the cars here for. (R. p. 200.)

Q. And they were used for that purpose?

A. Yes." (R. p. 201.)

We submit this testimony does not show that the coaches were being used in interstate commerce when the tragedy occurred. Therefore, Petitioner shoots wide of the mark when it makes such a statement.

The next clause in paragraph 4 is:

> "When moving in they (the soldiers) came fro Indiana, West Virginia and Kentucky, and when moving out they were destined for the Atlantic Sea Board Tranportation to the battle front in France."

We submit, with deference and respect, that this statement is also without any foundation in fact. There is no evidence that these coaches came in the morning of the day of the accident loaded with soldiers, or that they were to move out loaded with soldiers, or that they were being prepared for use to transport soldiers to another state or nation. To the contrary, the statement of facts by the Supreme Court of Mississippi, in every respect, is fully justified and warranted by the record in this case. Therefore, as the servants and the master were not engaged in interstate commerce, the Respondent's cause of action is governed entirely by the law of the State, and this Court is without jurisdiction, and the writ should be denied.

V.

Petitioner in Error When It Charges That Pleadings of Respondent Invokes the Federal Employers' Liability Act—pleadings Amended and Consolidated so as to Maintain Action Under State or Federal Laws.

The Petitioner, in paragraph 6, states that:

> "The Plaintiff then had cause of action continued, and on the 5th day of December, 1919 sued out letters of administration of the estate of Jesse Green deceased, and had Mrs. Maude E. Green ap-

pointed Administratrix, on the same day action was begun in the Circuit Court of Forrest County, Mississippi, against the Railroad Administration by the said administratrix, for the death of the said Jesse Green under the Federal Employers' Liability Act."

and at the conclusion of this paragraph:

"This declaration was filed on the theory that they were engaged in interstate commerce and the pleas admitted it so that proof of interstate character of service was obviated."

Respondent respectfully submits that both the statements set forth are without any foundation in fact and not supported by the record. It is true that on the 3rd day of October, 1919, Mrs. Maude E. Green and her four children brought suit to recover for the death of the said Jesse Green, and it is true the Petitioner filed a plea to this declaration setting up that the master and the deceased conductor and engineer were engaged in interstate commerce at the time of the difficulty, and it is true that Petitioner plead in answer to this declaration that deceased Green assumed the risk. While the case was in this attitude and after the respondent had filed replication to Petitioner's plea in which it was denied that the deceased Green, or the engineer, were engaged in interstate commerce, or that Green had assumed the risk, the case was continued by the Court, and it is true that Mrs. Maude E. Green was appointed Administratrix of the estate of Jesse Green, deceased, and it is true that another suit was filed by her against Petitioner for the death of Jesse Green, but it is not true that this declaration was filed on the theory that they were engaged in interstate commerce. To the contrary, it was not stated in the above declaration, nor was it stated in any count of the first declaration, that the deceased Green, or other employees, were engaged in interstate commerce at the time of the accident. As soon as Mrs. Maude E. Green had been appointed Administratrix a motion was filed asking

leave of the Court to amend the first declaration by substituting her as Administratrix as the plaintiff, in lieu of herself as next of kin and as next friend of her minor children. This motion was sustained, and the two suits were each in the name of the Administratrix, and each being on the same cause of action, another motion was filed asking that the two suits be consolidated. This motion was also sustained, without objection or exception. Now, the purpose of this amendment, and the purpose of the new suit was not, as stated by Petitioner, to charge that deceased Green, or Petitioner, were engaged in interstate commerce at the time. The amendment and consolidation were for the reason that under the State law, the suit may be brought either by the next of kin or in the name of the legal representative at the option of the partoes suing. The Federal Employers' Liability Act provides that the suit must be brought in the name of the legal representative, and if this cause had been prosecuted in the name of the next of kin, the Petitioner would have had two opportunities to defeat the action, to-wit: First, that the deceased was engaged in interstate commerce. Second, that deceased assumed the risk. If the deceased was engaged in interstate commerce at the time, this alone would be sufficient, as the suit was in the name of the next of kin who would have had no title to the cause of action in such case, which would be a good plea in bar to the cause of action as brought. If Petitioner could show that the deceased assumed the risk, this would also be a sufficient plea in bar to the action. Now, if the Petitioner and the deceased were engaged in interstate commerce, and if the suit had been brought in the name of the Administrator, the simple fact that they were engaged in interstate commerce would not be a good defense in bar to the action. Therefore, in order to avoid and to prevent the Petitioner having the advantage of pleading that the deceased was engaged in interstate commerce, as a bar to the action, the suit was changed from a suit in the name of the next of kin to a suit in the name of Administratrix.

We repeat there is no allegation in either one of the three counts of the first declaration, nor is there any allegation in the amended declaration that deceased Green, or the engineer, or the Petitioner, were engaged in interstate commerce at the time of the accident.

VI.

Petitioner in Error in Stating Case Was Tried on Theory That Parties Were Engaged in Interstate Commerce.

The allegation of fact in paragraph 7:

> " * * * the case of action was then tried out on the theory that they were engaged in interstate commerce."

> " * * * the defendant defended on the theory that the engineer and conductor at the time of the difficulty, were not engaged in and about their master's business,"

and the statement in said paragraph:

> " * * * the case was tried on the theory that if they were engaged in and about the master's business that they were engaged in interstate commerce. The pleading made no issue on this fact. The proof showed that they were so engaged in interstate commerce and the proof being uncontroverted, the Court adopted the theory and so charged the jury."

On this question the Mississippi Supreme Court in this case, 87 So. 652, say:

> "The plaintiff contended in the Court below that the liability was given by State law and contends in this Court that this is true."

It therefore appears that Petitioner again shoots wide of the mark in its statement of the facts as to the theory on which the case was tried.

VII.

Petitioner Pleaded Federal Act and Therefore Burden of Proof on Petitioner to Show That Employees Were Engaged in Interstate Commerce.

The Petitioner, in the trial Court, and in the Supreme Court of Mississippi, never suggested, argued or contended that the pleadings in the cause were such as to remove the necessity of any proof as to whether the deceased Green was engaged in interstate commerce. In the State Court the Petitioner requested the trial court to instruct the jury peremptorily that the employees were engaged in interstate commerce at the time this cause of action arose, and over the objection of respondent this instruction was granted, not on the ground that no proof was necessary, but on the ground that the testimony introduced to show that he was so engaged, was conclusive.

VIII.

No Federal Question Involved in Award of Damages.

The Petitioner in paragraphs 8 and 9, presents an erroneous view of the State Court's action in disposing of the question of damages in that court. The State Court in its opinion after holding that under the pleading and testimony in the case, the deceased Green was not engaged in interstate commerce at the time of his death, and after holding that the trial court was in error in this regard, then proceeded to take up the question of damages. The Petitioner having objected to the amount of the verdict on the ground that the verdict was excessive, (see record page 216), at this page of the record, the court will see the State Court in its opinion first called attention to the difference between the State law and the Employers' Liability Act on the elements of damage, which could be considered, and on a comparison of the elements of damage which might be considered under each act, held that a much larger verdict might be sustained under the State

statute than could be sustained under the Federal statute, and that since the State Court had adopted the Federal statute and standard, the State Court would consider the Petitioner's objection on the question as to whether or not the verdict was excessive in accordance with this rule, and held that the verdict was excessive measured by this rule and reduced the verdict to an amount much less than would have been sustained under the State statute, and because of this fact, the court's opinion then provided if respondent did not wish to accept this reduction insofar as the damages were concerned, same would be reversed and a jury impanneled to award the damages in accordance with the State statute. In no place in this opinion can Petitioner cite the Court where the State Court sustained the theory of the Petitioner, as stated in paragraph 9 of the Petition that deceased Green was engaged in interstate commerce at the time of his death.. We therefore respectfully submit that the question of the award of damages is not a question for the consideration of this court.

ARGUMENT.

VIII.

Petitioner in brief assumes and states facts not supported by the Record. Pleadings of Respondent amended and consolidated in trial court in order to maintain cause either under the State or Federal law.

The respondent would respectfully show that the petitioner continues in its brief to re-assert the errors of fact contained in the original petition, and on the basis of such errors of fact proceeds to argue questions of law, that respondent contends do not arise in this case. It is asserted as a fact in petitioner's brief that the declaration was filed under the Federal Employers' Liability Act, and it is asserted that the declaration alleged that the deceased, Green, was engaged in interstate commerce,

whereas, as a matter of fact, no such allegations are contained in the declaration. To the contrary, it was charged in one of petitioner's pleas only, that deceased, Green, was engaged in interstate commerce, and this fact was denied by the respondent's replication, and this denial was held to be sufficient by the Supreme Court of the State.

The Court, in Hines v. Green, 87 So. 649, says in part as follows:

> "The original declaration was filed in three counts, alleging that the engineer was an unsafe and dangerous man to be employed and with whom to work, on account of his quarrelsome, dangerous, and vicious habits and character, which were known to, or by the exercise of reasonable diligence ought to have been known to, the appellant.
>
> The appellant defended under the general issue, and filed certain special pleas. Among other pleas, it pleaded that the deceased and the engineer were at the time of the killing engaged in interstate commerce for the appellant, and that the liability of the appellant was covered by the Federal Employers' Liability Act (U. S. Comp, St. Secs. 8657-8665), and that under this act there was no liability upon the appellant for the death of the appellee's intestate. When this plea was filed by the defendant a new suit was filed by the appellee as administratrix under the Federal Employers' Liability Act, in which the acts alleged in the other suit were declared on, and it was alleged that at the time of the injury the deceased and the engineer were engaged in the business of the master and in furtherance of the master's business, bringing the case under the Federal Employers' Liability Act, and then, upon motion of the appellee, the two suits were consolidated by the Circuit Court without objection, and the case proceeded to judgment, resulting in a verdict and judgment of $35,000 in favor of the appellee as administratrix."

* * * "The plaintiff contended in the court below that the liability was given by the State law, and contends in this Court that this is true."

We therefore submit that insofar as the question of pleading is concerned, there are three answers to petitioner's position, the first is, that petitioner's contention is not supported by the facts in the case, and as to this, respondent respectfully submits that the declaration did not allege as charged in the petition that deceased, Green, was engaged in interstate commerce, nor did the respondent in filing and prosecuting her action proceed on this theory. The record also shows that only one plea was filed by the petitioner in which it is charged that deceased, Green, was engaged in interstate commerce at the time of his death. The other two pleas being the general issue and a special plea undertaking to set up assumption of risk. The record shows that respondent filed replications to each special pleas and took issue with same, and the issue was properly joined on these questions.

Respondent also submits that it was on this theory the petitioner introduced proof in the trial court, and it was on this theory that respondent objected to the trial court's ruling that the testimony introduced was sufficient to show that deceased, Green, was engaged in interstate commerce, and continued to press this objection in the Supreme Court, and in discussing that objection in the Supreme Court of Mississippi argued only questions of fact, and it was on this theory that the petitioner in replying to respondent's objection and argument in that court, also undertook to justify such ruling by also referring to the facts, never at any time making the argument in that court as he seeks to do in this, that because of the condition of the pleading no proof was necessary on the question as to whether or not the deceased, Green, was engaged in interstate commerce. Petitioner undertook to prove it in order to support his plea, and he failed to do so. Therefore, as contended by respondent in all the Courts, the State law should prevail. The second answer to petitioner's position in this regard is, that the Su-

preme Court of the State of Mississippi in its opinion in this case on the record before it decided that there was an issue on this question properly presented by the pleadings and petitioner in filing a suggestion of error in that court at no time ever suggested to the Supreme Court of the State of Mississippi that it was in error as to that part of its decision. The third answer to petitioner's position is, that the decision of the Supreme Court of the State on this question of pleading is non-federal and final, and this court is bound by the ruling of the State court in regard to such pleading.

In National Foundry Works v. Oconto City Water Supply Co., 46 L. Ed. 157, the Court holds:

> "That questions of pleading when considered solely as questions of state practice are outside the scope of review on writ or error to a state court."
>
> Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87; 40 Law Ed. 85.
>
> Johnson v. Drew, 171 U. S. 93, 43 L. Ed. 88.

Also, in the case of Allen v. Alleghany Co., 196 U. S. 458, 49 L. Ed. 551, it is again held by this court that the decision of a state Supreme Court on questions of pleading is non-Federal and final.

Since the Supreme Court of the State of Mississippi has decided that the issue was properly joined, insofar as the question of whether or not the deceased, Green, was engaged in interstate commerce at the time of his death in accordance with the rules of pleading and practice in that State, respondent respectfully submits that this rule of law completely answers his petition on the question as to whether it was necessary for proof to be introduced to show that deceased, Green, was engaged in interstate commerce at the time of his death.

The next question presented by the petition and brief of the petitioner is based on the contention that

the testimony in the case shows that deceased, Green, was engaged in interstate commerce at the time of his death. On this proposition respondent respectfully submits that there is two separate, distinct and complete answers; the first answer is that in any view of the case this is a question of fact and not a question of law, and the decision of the Supreme Court of the State on questions of fact is non-Federal and final. *The second answer is, that the finding of the Supreme Court of the State on this question is supported by the uncontradicted testimony in the record, and for this reason the writ should be denied without regard to the question as to whether it had final jurisdiction on questions of fact.*

On the first proposition, we call the Court's attention to the case of *Allen v. Southern R. R. Co.*, 173 U. S. 479, 43 L. Ed. 775, in which this Court says:

> "In inquiring whether jurisdiction to review a decree of a state court may be declined because such decree may be sustainable on an independent no-federal ground, the Supreme Court of the United States considered only the final action of the highest court of the state in disposing of the controversy, and is not concerned with the conclusion of the trial court or of a department of such highest court."

The record in this case shows that the Supreme Court of Mississippi decided what the facts were with regard to whether the deceased, Green, was or was not engaged in interstate commerce at the time of his death, and in making this statement we do not mean that the Supreme Court held as a conclusion that the deceased, Green, was not engaged in interstate commerce at the time, but we mean to say, that the facts were found by the Court and are stated by the Court in its opinion in the record, and from these facts the Court concluded that the deceased, Green, was not engaged in interstate commerce at the time of his death, and the point we make is not that this Court is bound by the conclusion reached

by the Supreme Court of the State that the deceased was not engaged in interstate commerce at the time of his death, but that this Court is bound on the finding of the Supreme Court of the State of Mississippi as to what the facts were in this record.

For authority on this proposition we respectfully call the Court's attention to the case of *Dower v. Richard*, 151 U. S. 658, 38 L. Ed. 305, in which it is said:

> "The reasons against the exercise by the U. S. Supreme Court of its jurisdiction to review a judgment of a state court which rests on an independent ground of law, not involving a federal question, are as strong if not stronger when the decision of the state court proceeds upon matter of fact only."

In the case of *Gardiner v. Bonesteel*, 45 L. Ed. 574, the Court held:

> "The Supreme Court in the review of action from the state court will follow the findings of facts of this Court."

We understand the rule to be that this Court accepts as binding the findings upon issues of fact duly made in the Court of last resort in the State.

Waters-Pierce Oil Company v. Texas, 212 U. S. 86.

Rankin v. Emigh, 218 U. S. 27.

Kerfoot v. Bank, 218 U. S. 281.

In *Christman v. Miller*, 197 U. S. 313, it is said:

> "Findings of fact are conclusive on the Supreme Court of the United States in cases coming up from the state court."

In *Chapman & D. Land Co. v. Bigelow*, 206 U. S. 41, 51 L. Ed. 953, the Court held:

"The decision of state court upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States."

And to the same effect may be found the following cases:

Keokuk & H. Bridge Co. v. Ill., 175 U. S. 626, 42 L. Ed. 299.

Jenkins v. Neff, 186 U. S. 230, 46 L. Ed. 1140.

Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92, 45 L. Ed. 765.

Bartlett v. Lockwood, 160 U. S. 357, 40 L. Ed. 445.

"Alleged errors of a state court which involves questions either of fact or of state and not federal law, are not reviewable in the United States Supreme Court on writ of error."
Quimby v. Boyd, 128 U. S. 488, 32 L. Ed. 502.

"In actions at law this court has no jurisdiction to reverse the decision of the highest court of a state upon a question of fact, although a federal question might arise, if the question of fact were decided in a particular way."

Israel v. Arthur, 152 U. S. 355, 38 L. Ed. 476.

Many other cases could be cited along the same line. We submit the above should be sufficient to sustain the proposition that the finding of the Supreme Court of the State as to the facts in this case is final.

On the discussion of the second proposition, it is necessary for the Court to compare the finding of the State Supreme Court as to the facts with the record in this case upon which such finding was made.

The testimony in the record is very short and is copied in our statement of fact, to which we respectfully refer the Court.

We respectfully submit that this testimony shows that the deceased, Green, and the other employees, were not engaged in interstate commerce at the time when, and the place where Green was killed. None of the cars were loaded with any kind of freight. The passenger cars were used and were to be used in trains which ran from the City of Hattiesburg to Camp Shelby or to Gulfport and Jackson, points in Mississippi. This engine and these coaches were in no sense being used as interstate conveyances at the time and place of the tragedy. Even while they were in active use on the main line of defendant, they crossed no State line, and the fact, if it is a fact, that passengers occasionally rode therein on a journey to other States, did not make them interstate conveyances in the yards of petitioner while they were empty and being cleaned.

Volume 2, Roberts Federal Liability on Carriers, Sec. 503, states the rule to be:

> "The ordinary and usual test in determining whether switching crews employed in railroad yards are engaged in interstate commerce or whether at the very moment of the accident they are assisting in moving interstate traffic, that is, cars either loaded or empty originating in one state and destined to a place in another state, territory or foreign country."

See *Erie R. C. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319.

Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 60 L. Ed. 324.

Penn. Ry. Co. v. Donat, 239 U. S. 50, 60 L. Ed. 139.

I. C. R. R. Co. v. Benhams, 233 U. S. 473, 58 L. Ed. 1051.

Clarke v. Erie R. R., 230 Fed. 478.

A. G. S. R. R. Co. v. Skotzy, 71 So. 335.

IX.

The Petitioner Pleaded Federal Employers' Liability Act, Burden Was On It to Prove Act Applied. No Such Proof Was Made, Therefore Act Does Not Apply.

> "When the defendant seeks to prevent recovery under the state law by showing the federal act controls, the defendant has the burden of proof, and that the employee was engaged in interstate commerce at the time of the injury."
>
> Roberts Injuries to Interstate Employees, Vol. 1, Section 466, page 808.

In *Chicago, B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177, the Court held:

> "Unless the injured employee of an interstate and intrastate carrier is engaged in interstate commerce at the time of the injury the Federal Employers Liability Act does not apply, and it is immaterial whether such employee had previously been, or in the immediate future was to be, engaged therein."

In *Railroad Company v. Yorknis*, 238 U. S. 439, the Court held:

> "An employee of a carrier engaged in removing coal from storage tracks to coal chutes, is not engaged in interstate commerce even though the coal had been previously brought from another state and was to be used by locomotives in interstate hauls."

In *Shauks v. R. R. Co.*, 239 U. S. 556, the Court held:

> "The Federal Employers Liability Act refers to interstate commerce in a practical sense, and the test is whether the employee at the time of the in-

jury was engaged in interstate transportation or in work so clearly related thereto as to be practically a part thereof."

In *Minn. St. Paul R. Co. v. Winters*, 242 U. S. 353, the Court held:

"When a state court applies the Federal Employers Liability Act to an action governed by the state law, the error is not ground for reversing the judgment upon the complaint of a party who did not oppose but invoked and relied upon the application of the federal statute."

"In such circumstances, however, this court will not pass upon question concerning negligence and assumption of risk if the facts touching the plaintiff's employment are stated and agreed and failed to make a case within the federal act."

"The injury occurred while plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury, and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce or to it at the time. Held not a case within the Federal Employers Liability Act."

In the opinion delivered in this case the Mississippi Supreme Court, 87 So. 648, says:

"The United States Supreme Court has laid down the test for determining whether the Federal Employers' Liability Act was applicable in the following language:

" 'Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as

practically to be a part of it.' *Southern Pac. Co. v. Industrial Accident Commission*, 251 U. S. 259, 263. 40 Sup. Ct. 130, 131 (64 L. Ed. 258); *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 151, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, 438, L. R. A. 1916C, 797; *New York C. R. Co. v. Porter*, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536; *Kinzell v. Chicago, M. & St. P. R. Co.*, 250 U. S. 130, 133, 39 Sup. Ct. 412, 63 L. Ed. 893, 896.

"Measured by this test, the facts do not bring the case within the Federal Employers' Liability Act, for the reason that none of the things being operated and moved at the time of the injury were being then used in interstate commerce, nor were they intended to be so used immediately upon being placed in condition for use, nor was there any fixed time or purpose for their early use so as to make them so intimately connected with interstate commerce as to be practically a part thereof."

We respectfully submit that this announcement of the law as applicable to the facts as shown by the record in this case is correct.

XI.

No Error in Record of the Trial Court Whether Cause of Action is Controlled by State or Federal Court.

We respectfully submit that this case viewed from any standpoint, whether governed by the State or the Federal Law was properly tried in the Court below, the trial Court. As a matter of fact the petitioner sought and obtained in the trial Court a more favorable announcement of the law than it was entitled to receive. On this point the Mississippi Supreme Court, 87 Southern 652, says:

"There are a number of assignments of error as to instructions complained of by the appellant, but the errors, if any, are favorable to the appellant, and require more facts to be found to render liability against the appellant than the law required."

We therefore respectfully submit that the application and motion for a writ of certiorari should be denied.

Respectfully submitted,

Attorney for Respondent.

E. L. DENT,
CURRIE & CURRIE and
J. W. CASSIDY,
Of Counsel.

I hereby certify that I have this day mailed, postage prepaid, to Hon. T. J. Wills, Attorney for Petitioner, Hattiesburg, Miss., his post office address, a true and correct copy of the above and foregoing statement of facts and brief.

This September 26, 1921.

Attorney for Respondent.

FILED
NOV 23 1922
WM. R. STANSBU
CLER

No. 132
In The
Supreme Court of the United States

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

VS. NO. 439.

MRS. MAUD E. GREEN, ADMINISTRATIX OF THE ESTATE OF JESSE GREEN, DECEASED.

BRIEF OF APPELLANT

T. J. WILLS,
Attorney for Petitioner.

In The
Supreme Court of the United States

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

VS. **NO. 439.**

MRS. MAUD E. GREEN, ADMINISTRATIX OF THE ESTATE OF JESSE GREEN, DECEASED.

BRIEF OF APPELLANT

T. J. WILLS,
Attorney for Petitioner.

BRIEF OF APPELLANT

MAY IT PLEASE THE COURT:

This case is before this court on a writ of certiorari to review the judgment of the Supreme Court of the State of Mississippi, affirming the judgment of the Circuit Court of Forrest County, in which judgment was rendered for the plaintiffs and against the defendant for $35,000.00. The case was tried in the Circuit Court of Forrest County on a declaration alleging, and pleas admitting, that the deceased, Jesse Green, at the time he met his death was employed in interstate commerce, and the defendant petitioner herein was so engaged.

The declaration and the pleas having been constructed on the theory that the plaintiff was employed in interstate commerce and the defendant so engaged, the trial proceeded on that theory without specific proof having been introduced on this point. On the pleadings so made the judge charged the jury that the deceased, Jesse Green, together with the master was engaged in interstate commerce at the time the engineer killed him. (Top of P. 42 of printed transcript).

The Supreme Court of Mississippi in deciding the case said:

> "The trial proceeded as above on the theory that the plaintiff was limited to elements of damage recognized by the federal Employers' Liability Act, and as the jury only had these elements submitted for its consideration, the verdict is excessive and it can not be upheld upon any theory that the jury might have found elements of damage if properly instructed, which might be sustained under the elements recognized by the state law."

The court, however, held that the case had not been brought within the federal Employers' Liability Act. The court held that there was no liability under the federal Employers' Liability Act but that there was liability under the state law. The decision of the lower court was affirmed with a remittitur down to $16,000.00.

STATEMENT OF FACTS: The deceased, Jesse Green, was shot and killed on the 5th day of August, 1918. On that date the deceased was engine foreman and Zack McLendon, engineer on a switching crew in the yards of the Gulf and Ship Island Railroad in Hattiesburg, Mississippi. There was located at Hattiesburg a military training camp, Camp Shelby, where soldiers for this camp were brought in over the Gulf and Ship Island Railroad. The soldiers came both from the State of Mississippi and from other states to this training camp to be trained and then were moved over the Gulf and Ship Island Railroad to points beyond the State for service in the war that was then being prosecuted against Germany and her allies.

On the morning of the 5th day of August, 1918, four coaches so used had been left by the morning train at Hattiesburg. The switching crew, which the deceased Green and the engineer McLendon were handling, were moving these four coaches along the main track and had reached the switch where the coaches would be parked off the main line, there to be cleaned and made ready for the soldiers that were to be moved by the next outgoing train. In addition to the four coaches, this train consists of a coal hoist used in loading coal on locomotives at Hattiesburg. This coal hoist had been in service in coaling engines for the Southern Railroad and was being returned to the yards of the Gulf and Ship Island to be used for the same purpose in coaling engines operating over the Gulf and Ship Island Railroad.

Zack McLendon, the engineer, had been in the employ of the Gulf and Ship Island Railroad for about eighteen years. When the railroads were taken over and operated by the Government, without change of employment, McLendon continued in the service of the Government in the operation of the switch engine in the yards of Hattiesburg. He at one time in his service was operating a passenger train and while so operating said train, he was injured by his train going in an open switch. Thereafter he selected a switch engine for the performance of his work. The record

discloses that he was a stickler for observing the rules. It is shown that it was customary for train crews to disregard rules; that an observance of the rules placed upon the train crews much heavier burdens and duties than would be imposed if the rules were disregarded. McLendon was constantly in a controversy with his crews because of his observance of the rules and his insistence upon the members of his train crews observing the rules. In fact, every complaint made against him when investigated disclosed that he was right and the complaining member of his crew wrong in the controversy growing out of the operation of the trains.

Several years previous to the date on which McLendon killed Green, he and Green were working together as engineer and switch foreman. They were unable to work in harmony. Their differences grew out of Green's inclination to disregard the rules and McLendon's insistence upon his observance. The Gulf and Ship Island Railroad Company at that time separated the two men, placing Green upon the night run and McLendon on the day run. This prevented the two men from coming in contact with each other, and avoided the unpleasantness that grew out of their different methods of performing their duties.

In 1916, there was a trainmen's strike on the Gulf and Ship Island Railroad. In the settlement of the strike a contract was entered into between the Gulf and Ship Island Railroad Company and the Trainmen, and this included the switching foreman, by which among other things, a rule of seniority was recognized. Under the seniority rule the oldest man in the service could select by first choice the place where he should work. And each in turn in accordance with his age of service was permitted under this contract to select the run upon which he would be assigned. Under this rule of seniority Green selected the position as switching foreman in the crew in which McLendon was engineer. Since they had been separated previously, the Railroad refused to assign Green to McLendon's run when the request was first made. Green then procured the intervention of

the chairman of the trainmen and conductors to compel his assignment to the position of his choice and which under the contract he was entitled to select. After this intervention of the chairman, Green was assigned to the crew on which McLendon was engineer.

The deceased, Green, as engine foreman instructed the trainmen under him in signalling the engineer to continue repeating the signals until they were sure that they had been seen and understood. The head brakeman or trainman on his crew was a negro. McLendon objected to the signals being given in repitition and instructed the brakeman to desist from repeating the signals: to give only one signal and it would be obeyed. This brakeman advised McLendon that he was working under Mr. Green's instructions and that he would do the best he could to obey the instructions Mr. Green had given him.

On the morning that the accident occurred in leaving the north yards the negro brakeman signalled the engineer forwarded and repeated the signal. The engineer procured a little hammer and struck this brakeman on the head therewith and knocked him off the moving train. This happened some few hundred yards from the switch through which the train would pass in going from the main line to the track where the coaches would be left to be cleaned and put in condition for service for the next movement of soldiers from Camp Shelby.

When the train reached the switch and stopped, awaiting the throwing of the switch to enable the train to pass on the side track, McLendon took his gun in his hand and got off his engine down to the ground and awaited the arrival of Green, who was riding on the back end of the train and would of necessity come by the engine in reaching the switch. It became necessary for Green to throw the switch as the negro who had been struck on the head by the engineer had been carried to the hospital by the other members of the crew, leaving no one to throw the switch except the engine foreman, Green.

When Green came opposite to where McLendon was standing, some words were passed between them, the nature of the controversy is not shown. McLendon then fired on Green and killed him.

Suit for the death of Green was instituted by his widow and children under the state law. Pleas were filed setting forth that the defendant Railroad Administration was engaged in interstate commerce, and that the deceased, Jesse Green, was so employed at the time of his death. The case was then passed and the widow qualified as administratrix of the estate and filed a new suit under the federal Employers' Liability Act. Pleas were filed t othis declaration, setting up that the defendant was engaged in interstate commerce and the deceased was so employed at the time of his death. When the case came on for trial, both suits were consolidated and the case proceeded to trial on the theory that the Federal Employers' Liability Act controlled. This theory of the case was made by the pleadings of plaintiff and the defendant. Upon thistheory of the case made by the pleadings, the court charged the jury on the pleadings and the proof that the defendant was engaged in interstate commerce and the deceased so employed at the time of his death. The case was submitted to the jury on the question of the negligence of the master in retaining in his service McLendon, whom it was charged was a dangerous fellow employee with whom to work. The trial resulted in a judgment for plaintiff for the sum of $35,000.00. The Supreme Court of the State of Mississippi decided that the judgement could not be upheld under the rules governing employees engaged in interstate commerce. It held that the master was not engaged and the deceased not employed in interstate commerce, and affirmed the judgement with remittitur.

ARGUMENT: Petitioner and the deceased Green were engaged in interstate commerce. The deceased, Jesse Green, was employed by petitioner in the capacity of engine foreman of the switching crew at the time he met his death. The particular work that he was doing, immediately preced-

ing the shooting that resulted in his death, was carrying four coaches from the main line where they had been left by the passenger train to a switch track upon which they would remain while being cleaned and prepared for service in the next outgoing train, on which soldiers would be carried. In addition to the four coaches thus being moved, there was in this train a coal hoist used in coaling the locomotives operating over the line of the Gulf and Ship Island Railroad. Under Government control this coal hoist was used interchangeably on the Southern Railroad, passing through Hattiesburg and the Gulf and Ship Island Railroad, the two roads crossing each other in Hattiesburg. The pleadings fix the character of the employment without placing the burden of proving the character of the work upon either party litigant. The facts, however, show that they were engaged in interstate commerce.

This court said in a recent case:

> "And besides, as observed by the Supreme Court of the state of California in Southern Pacific Co. vs. Industrial Accident Comm'n, supra, Di Donato's duty had other purpose than the prevention of a disaster to a particular train. It had purpose as well to the condition of the tracks and their preservation from disorder and obstructions. This service and the other service cannot be separated in duty and responsibility. It is to be remembered that not only the remedy of one employee is involved in a particular duty but that of other employees and other remedies are to be considered as well and the defenses to them, and that behind them are the respective powers that may have ordained them. Therefore, whether they be of state or congressional power, there is an equal necessity for their accurate delimitation. This case, therefore, has importance beyond the interest of the parties to it. Its principle and example, reinforcing the Pederson Case and the cases based upon it, make a test by which future cases may be assigned to intrastate or interstate commerce and mark the power and policies that may be necessary or convenient to either."

Philadelphia & Reading R. R. Co. vs. Di Donato, 41 Sup. Ct. Rep. P. 518.

See also Industrial Accident Commission vs. Payne Agent 42 Supt. Ct. Rept. P. 489.

Petitioner is not liable in damages for injuries wilfully inflicted upon one of its servants by a fellow servant in the common employment. This is true whether the relationship of master and servant is controlled by the common law or falls within the federal Employers' Liability Act.

Roebuck vs. A. T. S. F. R. R. Co., 99 Kansas 542. 162 Pacific 1153. L. R. A. 1917, P. 741.

Hully vs. Moosbrugger, 95 Atlantic 1007.

L. & N. R.R. C. vs Hudson, 73, Southeastern, P. 30.

The trouble between McLendon and Green was of long standing. McLendon abandoned his post of duty on the engine and went on the ground and there engaged in a personal controversy with the deceased, Green. Under the express rules laid down by the Supreme Court of the State of Mississippi, there could be no recovery had those rules been followed in the decision of this case.

Hinds vs. Cole, 85 Southern Reporter, P. 199.

Petroleum Iron Works vs. Bailey, 86 Southern Reporter, P. 644.

Prior to 1916 the deceased, Green, had been engaged in work as the engine foreman of McLendon, who was acting as engineer. They were unable to work together in harmony. They had been separated. After the brotherhood of which Green was a member, had forced a contract with the railroad, by which the seniority rule was recognized, the deceased, Green, compelled the Railroad Company, over its objection, to assign him as engine foreman over McLendon and his crew. The disposition of McLendon was well known to Green, and in selecting the position thus assigned him, he

assumed all of the risk of the dangers that such employment would entail.

Chespeake & Ohio Railroad Co. vs. J. J. D'Alley, 241 U. S. p. 310.

C. R. I. & P. R. R. Co. vs. Ward, 252 U. S. p. 18.

The railroad was operated by the Director General appointed by the President under the authority of Congress authorizing the taking over of the railroad as a war measure. This suit was brought in the state court under the authority granted in Act of March 21, 1918, Chapter 25, Section 10. The case is reviewable in this court irrespective of the questions arising under the Federal Employers' Liability Act.

This court held that a suit against the Director General was a suit against the Government, and notwithstanding the fact that Congress, under Act of March 21, 1918, provided that the carrier shall be subject to all laws and liabilities as common carriers whether arising under the state or federal laws or common law; that the Director General was not liable for penalties for failure to perform acts, which said failure, would have imposed the penalties upon the owners of the road had they been operated by the owners and not under federal control.

Missouri Pacific Railroad Co. vs. Ault, 41 Supreme Court Rep. p. 593.

The court in the above case of necessity held that the Director General of railroads in operating the railroads occupied a status different from that of corporations operating them. That only claims and damages that were just and equitable were enforcible against the Director General, who was but the agent of the Government, and which in fact was a claim against the Government itself. The court said in the Ault case:

"But whether in a proceedings against the Dir-

ector General, it shall be deemed compensation or a penalty presents a question not of state but of federal law."

It was in no wise intended by Section 10 of the Act of March 21, 1918, to repeal or supersede Section 10 of the Act of March 3, 1887. The Federal Control Act of March 21, 1918, was but supplemental to the previous act. It does not deprive this court of jurisdiction to review judgements against the United States Government.

This court said:

> "It was definitely held in Missouri Pacific Railroad Co. vs. Ault that at all the times here involved Section 10 of the Federal Control Act permitted the Government, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railroad in his custody, precisely as a common carrier corporation operating such road might have been sued, and that recovery, if any, would be from the United States."
>
> "Thus plainly the petitioner had the right to sue the Director General o fRailroads for negligently injuring him, and if successful, his recovery must have been from the United States."

Dahn vs. Davis, Agent, 42 Sup. Ct. Rep., 320.

The court held in the above case that the petitioner could not recover from the Director General for the reason that he had elected to take compensation under the Employees' Compensation Act, and that by electing to accept the benefits of the Compensation Act, he was barred from prosecuting his suit against the Government for the injuries sustained.

Petitioner had been injured by the operation of a train under the federal control on the Illinois Central Railroad. Had petitioner been injured by the Illinois Central Railroad Company while in the employment of the Government, his compensation would in no wise have estopped him from recovering against the corporation for the injury so sustained.

The holding of the court in this case indicates clearly that Section 10 of the Act of March 21, 1918, does not place the Director General of Railroads in the same status in the operation of the common carriers that the corporate owners are in while operating their lines.

This judgement under review can not be sustained under the federal Employers' Liability Act, nor under the common law as interpreted and enforced by the federal courts. It is not in harmony with the common law, fixing the status of master and servant as expressed in the previous decisions of the Supreme Court of Mississippi.

We submit that the case should be reversed and judgement entered for the Director General.

Respectfully submitted,

T. J. WILLS, Att'y for Petitioner.

I, T. J. Wills, certify that I have on this, the 22nd day of November, 1922, delivered in person copy of the above and foregoing brief to Hon. James W. Cassidy, attorney of record for respondent.

T. J. WILLS, Attorney for Petitioner.

Office Supreme Court, U. S.
FILED
NOV 22 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 132.

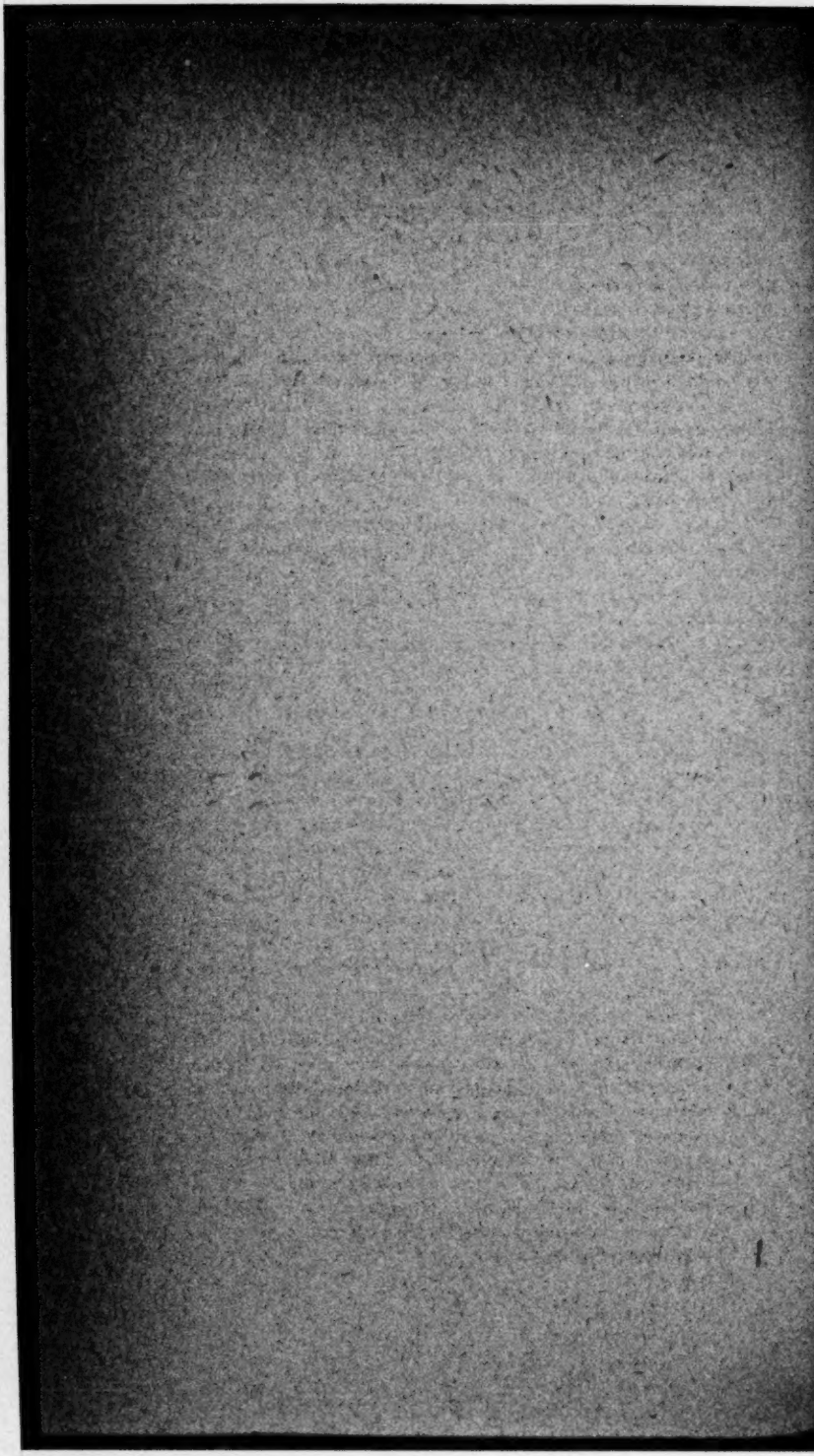
JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT,
PETITIONER,

vs.

MRS. MAUD E. GREEN, ADMINISTRATRIX, RESPONDENT.

BRIEF OF RESPONDENT.

E. L. DENT,
J. W. CASSEDY,
Attorneys for Respondent.



SUBJECT INDEX.

	Page.
Syllabus	1
Index—Table of cases cited	ii
Statement of case	1
No Federal question involved	3
Petitioner's statement of facts not supported by record	5
All evidence refutes statement of fact by petitioner as to the use and movement of cars in its yards	6
Pleadings amended and consolidated so as to maintain action under State or Federal law	16
Petitioner in error in stating case was tried on theory that parties were engaged in interstate commerce	18
Petitioner plead the Federal act. Burden of proof was on petitioner to show that employees were engaged in interstate commerce	21
No Federal question involved in award of damages	22
Argument	23
No error in record of the trial court whether the cause of action is controlled by a State or Federal court	34

SYLLABUS.

I. Statement of petitioner not based on facts and evidence contained in record, and is wholly at variance with findings of fact by Mississippi Supreme Court	1
II. No Federal question involved. Employees not engaged in interstate commerce. Case not governed or controlled by Federal Employers' Liability Act	3
III. Petitioner's statement not supported by the record	5
IV. Evidence of petitioner's witnesses refutes his statement of fact as to use and movement of cars in its yards	6
V. Petitioner in error when he charges that pleadings of respondent invoke Federal Employers' Liability Act. Pleadings amended and consolidated so as to maintain action under either the State or Federal law	16
VI. Petitioner in error in stating case was tried on theory that parties were engaged in interstate commerce	18
VII. Petitioner plead Federal Employers' Liability Act. Burden of proof on him to show that employees were engaged in interstate commerce. Proof does not establish this fact and Federal act does not apply	21
VIII. The question as to the amount and award of damages involves only questions of fact and is not open to consideration by this court	22

Page.

IX. No error in record whether the case governed and controlled by State or Federal law. Petitioner obtained more favorable announcement of law in trial court than he should have received..... 31

TABLE OF CASES.

Allen v. Allegheny Co., 196 U. S., 458; 49 L. Ed., 551..... 26
A. G. S. R. R. Co. v. Skotzy, 71 So., 335..... 31
Allen v. South. R. R. Co., 173 U. S., 479; 43 L. Ed., 775..... 27
Bartlett v. Lockwood, 160 U. S., 357; 40 L. Ed., 445..... 29
Chapman & D. Land Co. v. Bigelow, 206 U. S., 41; 51 L. Ed., 953. 29
Chicago, B. & Q. R. R. Co. v. Herrington, 241 U. S., 177..... 32
Christman v. Miller, 197 U. S., 313..... 29
Dower v. Richard, 151 U. S., 658; 38 L. Ed., 305..... 28
Erie R. C. v. Welsh, 242 U. S., 303; 38 L. Ed., 319..... 31
Grand Rapids & I. R. R. Co. v. Butler, 159 U. S., 87; 40 L. Ed., 85 26
Guardiner v. Bonesteel, 45 L. Ed., 574..... 29
Hines v. Green, 87 So., 649-652..... 24
Industrial Accident Commission v. Payne, Supreme Court Reporter, 42, 489..... 34
Israel v. Arthur, 152 U. S., 355; 38 L. Ed., 476..... 30
I. C. R. R. Co. v. Benhams, 233 U. S, 473; 58 L. Ed., 1051..... 31
Jenkins v. Neff, 186 U. S., 230; 46 L. Ed., 1140..... 29
Johnson v. Drew, 171 U. S., 93; 43 L. Ed., 88..... 26
Keokuk & H. Bridge Co. v. Ill., 175 U. S., 626; 42 L. Ed, 299... 29
Kerfoot v. Bank, 218 U. S., 281..... 29
Minn. St. Paul R. Co. v. Winters, 242 U. S., 353..... 32
National Foundry Works v. Oconto City Water Supply Co., 46 L. Ed., 157..... 26
Penn. Ry. v. Donat, 239 U. S., 50; 60 L. Ed., 139..... 31
Quimby v. Boyd, 128 U. S., 488; 32 L. Ed., 502..... 30
Railroad Co. v. Yonkers, 238 U. S., 439..... 32
Rankin v. Emigh, 218 U. S., 27..... 29
Seaboard Air Line Ry. v. Koennecke, 239 U. S., 352; 60 L. Ed., 324 31
Shanks v. R. R. Co., 239 U. S., 556..... 32
Waters-Pierce Oil Co. v. Texas, 212 U. S., 86..... 29
Western Union Tel. Co. v. Cal. Publishing Co., 181 U. S., 92; 45 L. Ed., 765..... 29
Roberts Injuries to Interstate Employees, Vol. 1, section 466, page 808..... 32
Vol. 2, Roberts Federal Liability on Carriers, section 503..... 31

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 132.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, PETITIONER,

vs.

MRS. MAUD E. GREEN, ADMINISTRATRIX, RESPONDENT.

STATEMENT AND BRIEF FOR RESPONDENT.

I.

Statement of Petitioner Not Based on Facts and Evidence Contained in Record, and is Wholly at Variance with Findings of Fact by Mississippi Supreme Court.

The Supreme Court of Mississippi, sitting in Banc, see Payne *v.* Green, 87 S. Rep., page 649, held as follows:

> (*a*) "Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character,

and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault.

(*b*) "Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact assaults the conductor because the switch is not thrown, so that the engine may proceed to its destination and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor.

(*c*) "When applicability of the Federal Employers' Liability Act (U. S. Comp. St., Secs. 8657-8665), is involved or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. *The facts in this case do not bring it within this rule, as the cars being switched neither carried interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose.*

(*d*) "Under the laws of this State the servant does not assume the risk, in cases against railroad companies, where the master is negligent."

(*e*) "Where in a suit against a railroad company for an injury to a servant no case for punitive damages is made, and where the court instructs the jury that the rules applicant to the Federal Liability Act (U. S. Comp. St., Secs. 8657-8665), governs the amount of damages, and where the verdict is in excess of the amount of the present cash value of that part of the expectancy which they could recover under such rule, but in fact the liability is governed by State law, the verdict will not be permitted to stand, unless a remittitur is entered, reducing the amount to such sum as could stand under such rule of liability.

It will be seen from the above statement in this case by the Supreme Court of the State of Mississippi in its opinion the statement of fact made by counsel for petitioner in his brief that deceased Jesse Green was engaged in interstate commerce at the time of his death is not supported by the record as interpreted and construed by the Supreme Court of Mississippi.

II.

No Federal Question Involved. Employees Not Engaged In Interstate Commerce—Case Not Governed or Controlled by Federal Employers' Liability Act.

Petitioner respectfully submits that there is no Federal question involved in this case for the reason that the employees were neither engaged in interstate commerce at the

time and place of the shooting resulting in the death of Jesse Green, the conductor.

The record in this case will show that the Gulf and Ship Island Railroad Company was chartered under the laws of the State of Mississippi, and it owned and operated a line of railroad extending from Gulfport to Jackson, both places in the State of Mississippi, and its line of railroad at no point extended beyond the State of Mississippi. There was no evidence in this record to show that this railroad company had or maintained any kind of traffic arrangements by which it completed the carriage of either passengers or freight in interstate commerce. It was shown in the record that this railroad company operated passenger trains running from Jackson to Hattiesburg and from Hattiesburg to Camp Shelby, all within the State of Mississippi. It was shown that many passengers were carried by this railroad at this time on these trains, and the number of passengers was largely increased on account of the soldiers being located at Camp Shelby, and for this reason it was shown that extra passenger cars were assigned to be used between Hattiesburg and Camp Shelby and Hattiesburg and Jackson. It was not shown that these passengers were interstate passengers and traveling on interstate transportation.

To the contrary the testimony was that the coaches involved in this suit were extra passenger coaches to be attached to a passenger train operated wholly within the State of Mississippi and to be used by such passengers as offered themselves for transportation, principally between Camp Shelby and Hattiesburg, there being no testimony showing that the Gulf and Ship Island Railroad engaged in the business of selling such passengers interstate transportation or

that the Gulf and Ship Island Railroad honored interstate transportation issued by some other railroad giving continuous right of passage over its road and using the Gulf and Ship Island Railroad as a connecting interstate carrier.

For these reasons we respectfully submit the Federal Employers' Liability Act does not control the servants of the Gulf and Ship Island Railroad while they were engaged in switching these passenger coaches in the railroad yards in Hattiesburg, Mississippi.

III.

Petitioner's Statement Not Supported by the Record.

We respectfully submit that there is no evidence in the record to support the statement made by the petitioner that the passenger cars or coal hoist were either engaged in interstate commerce at the time of this injury. The Mississippi Supreme Court states the following to be the facts relating to said cars and their movements:

> "The switching movement in the yard which was being done at the time of the killing was a movement of certain passenger cars and a coal loader and gon. The coal loader was being carried to the shops for repair and was not in use by the railroad company immediately preceding the movement, nor was it placed back in the service of loading cars for several days thereafter. The passenger cars had not been used in service on the day of the injury in any movement or on any operation for the railroad company, nor were they being carried to be cleaned for immediate use, but they were in fact placed in the service of the railroad company the day following the

injury. The passenger coaches were used both for intrastate commerce and for interstate commerce, as the needs of the railroad company called them into service. The injury occurred in the forenoon, and there was no purpose to use those cars during the day of the injury, nor was there any fixed or settled purpose to use them in such service at any particular time. Their use, or whether they would be used or not depended entirely upon the circumstances which might arise and were not controlled by any circumstance then existing, nor was there any settled purpose to use them at any particular time. They were merely used when the needs of the railroad company required their use."

The court will observe that there is a marked difference between the statement of facts as given by petitioner with reference to the use and movement of these cars and the statement of facts as given by the Supreme Court of the State of Mississippi.

IV.

Evidence of Petitioner's Witnesses Refutes His Statement of Facts as to the Use and Movements of the Passenger Car in Its Yards.

The first witness in behalf of petitioner, who testified as to the use and movement of the cars being switched in the yards, was John Gainy, a regular brakeman. He was asked:

"Q. What cars did you have that morning?
A. I did not take the numbers.
Q. Did you have two or three coaches?
A. When we were going to the south yards?

Q. Yes.

A. Yes.

Q. And were not those particular coaches used to move soldiers to and from Camp Shelby?

A. I don't know what they were used for, put them on that evening and then going to Jackson and bringing them back.

Q. Loaded with soldiers and nothing else—were not used for general passengers, were they?

A. I can't tell you.

Q. They were not used for general passengers from Hattiesburg to Gulfport?

A. No, from Hattiesburg to Jackson (R., p. 135).

Q. Unloaded them here with soldiers and carried to Jackson and loaded them and brought back the next evening?

A. Yes.

Q. That is true, is it not?

A. Yes, sir.

Q. They were not used for any other purpose except to make those trips?

A. I don't know.

Q. So far as you know?

A. Yes.

Q. You had been handling them day in and day out?

A. Saturday evening.

Q. For how long a time?

A. Ever since the camp was here.

Q. At this particular time you were taking them to the place where the cars were cleaned?

A. Yes.

Q. In order to bring them back and be loaded and carried to Jackson?

A. Yes—carried them to the south yard.

Q. Didn't you know that soldiers rode in those cars when they left here and went to Jackson?

A. Yes, sir.

Q. That is what they were used for?

A. I don't know who they loaded in them; I would be off duty when they were used.

Q. But you understood and knew they were the trains the soldiers were carried in, did you not?

A. Yes, I reckon they hauled soldiers.

Q. You knew that the coaches were set out and stood there until they were loaded the next Saturday night?

A. Yes.

Q. And were not used for anything except for that trip to Jackson on Saturday night?

A. We used so many—sometimes we would have to put coaches on other trains——

Q. You did not use those coaches down there except to haul the soldiers with? (R., p. 136.)

A. I don't know whether they loaded soldiers in cars or not.

Q. But you did not use the coaches you kept down there and handled every Saturday night and Sunday except to haul the soldiers from the Camp to Jackson in did you?

A. I don't know whether they loaded soldiers in them or not—I want to tell the truth if I can.

Q. Were the regular passenger trains made up do you know—were they made up here, Jackson, Gulfport, or where?

A. We did not make up any regular passenger trains here—no more than one or two——

Q. Don't you know that one makes up and starts at Jackson and Gulfport and passes here and all you did was to put coaches on here?

A. Yes.

Q. And those coaches were put on when they got here and loaded and for the purpose of carrying soldiers?

A. No answer."

It will thus be observed that this witness was without information entirely on the subject of the movements of the cars and knew nothing further than that simple fact that he was engaged in switching the cars in the yards when this tragedy occurred.

The next witness who testified on this subject was Mr. JACOBS (Record, pages 191-195), from which we quote:

"Q. As derrick engineer do you keep a book in which you keep records of the coal and other things you use?

A. Yes, I usually keep that.

Q. When you went up to the switch engine did you make a record of the cars and of the rolling stock being handled by the engine at that time?

A. When the sheriff got there they pulled the engine and cars on down in the yard and as they passed me I put the numbers down.

Q. What was that engine pulling?

A. Four coaches and coal hoist and a gon.

Q. What is that coal hoist—where was it being moved to?

A. From the Southern yard back home to the G. & S. I. shops.

Q. Do you know how it came to be in the Southern's yards?

A. They had borrowed it.

Q. You say it was being moved back home for what purpose?

A. I don't know.

Q. What was it used for when it got back?

A. They put it in the shop and repaired it and sent it to Jackson.

Q. That was used for what purpose?

A. Handling coal.

Q. Tell the jury how it handles coal?

A. It has a big dipper and we pick coal from the chute and throw it in and load the cars and engine with it.

Q. What engine did you load with that hoist?

A. All of them.

Q. All of the engines?

A. At that time we were using another at the shops, but that coal hoist had been to the Southern—but was the same kind.

Q. I am talking about this particular coal hoist when it was taken to the shops and repaired and was—sent where? (R., p. 192).

A. Jackson.

Q. For what purpose?

A. To coal engines.

Q. What engines was there to coal?

A. G. & S. I.

Q. And those engines were used for what purpose?

A. Freight and passenger and switch engine service.

Q. What passenger coaches were in that train?

A. As I walked down the train as they roll by I take the numbers of the coaches; the coach next to the engine was No. 20 and the second coach from the engine was No. 22, next one was No. 13 and next one No. 12.

Q. Was there anything else in that train other than the coal hoist and four coaches.

A. And the gon.

Q. What is the gon; do you know what that gon was?

A. No, sir—I had the number, it is torn out of my book. I put it down on that date and I see it is torn out.

Q. When did you make that record in that book of those coaches?

A. About thirty minutes after the killing.
Q That book been in your possession ever since?
A. Yes?"

Cross-examination:

Q. This coal hoist that you talk about, I understand it was not in service at all at the time the shooting occurred—had been borrowed by what road?

A. The Southern.

Q. Am I right in repeating that you stated it was not in service at all?

A. Not at that time.

Q. The Southern had another coal hoist it was using? (R., p. 193.)

A. They had been using it.

Q. But they had another they were using at this time?

A. Not that I know of.

Q. Didn't you say they had another?

A. The G. & S. I. had another.

Q. They had another coal hoist they were using and this so far as the G. & S. I. was concerned had been out of service some time?

A. Yes.

Q. And had not yet been returned to service?

A. Yes.

Q. The Company finally decided it would send this coal hoist to Jackson after repairing it?

A. It went up that week.

Q. After it went to Jackson did you say it was used in loading coal on the cars, etc.?

A. Yes, sir.

Redirect examination:

Q. You were asked if the coal hoist was in service—where was it being carried at the time?

A. It was put in the local next to the caboose and went north and sometime after that I was there and——

Q. Where was it being carried with that engine?

A. From the Southern's yard to the shops.

Q. Why to the shops?

A. I don't know, but they required it before it went up to Jackson.

Q. After they carried it to the shops what did they do with it?

A. Repaired it.

Q. And after being repaired what happened to it?

A. Sent it up the road.

Q. And you saw it at what point?

A. Jackson. (R., p. 194.)

Q. What did you see it doing at Jackson?

A. Coaling engines." (R., p. 195.)

The third and last witness on this subject was Mr. W. L. OAKLEY, whose testimony we quote in full. (R., pp. 198-201.)

"Q. Your name is W. L. Oakley?

A. Yes, sir.

Q. What position do you occupy?

A. Chief Dispatcher, G. & S. I.

Q. How long have you been Chief Dispatcher?

A. Since March 13, 1917—the last time.

Q. I will ask you if you have a record of coaches No. 20, 22, 13, and 12 of their movement, and for what purpose they were used?

A. Yes, we have a record in the office showing these coaches; the train they operated on, and for what purpose used.

Q. Do you know coaches M. D. K. and for what purpose they were used about August 5, 1918?

A. Yes, if I know the numbers.

Q. Take coaches No. 21, 12, 13 and 22?

A. Used on regular line—coaches operated on all rails using the G. & S. I. R. R. for any passenger business that they may be called upon to transport.

Q. They, then operated in the regular trains and regularly used for transportation?

A. They were used as regular cars or extra cars either as the occasion required.

Q. Have you the record with you? (R., p. 198.)

A. No, sir, did not bring any records with me—the train sheets are at the office.

Q. Take coaches No. 12, 13, and 20, what were they used for on the day preceding August 5, 1918, and for what purpose were they used on August 4, and on August 6, 1918?

A. They were used for the regular passenger service of the G. & S. I. R. R.

Q. In the regular passenger service what passengers were carried from Hattiesburg on August 4 and 6, 1918?

A. I would say that the cars were used in the regular passenger travel of the G. & S. I. R. R. As to dates, some of the passengers went to G. & S. I. points and possibly some went beyond the G. & S. I. R. R.

I will state that some of the passengers went to G. & S. I. points and some went beyond the G. & S. I. points.

Q. I will ask you to state whether or not those coaches were used regularly in transporting interstate passengers over the G. & S. I.?

A. Yes, they were used on the railroad for transporting all kinds of travel.

Q. What was located here with respect to the concentration of interstate passengers?

A. I don't understand.

Q. Was there any occasion at the time for the

handling of interstate passengers other than the ordinary time?

A. During that period we enjoyed a camp and we kept our extra equipment here for emergencies which would arise from time to time.

Q. Those coaches being left here and it is in evidence they were being carried down at the time to be cleaned and prepared to go back in service—were put in service to accommodate what passenger demand? (R., p. 199.)

A. Any passenger demand that the railroad might be called upon to handle.

Q. What would be the occasion of extra passenger coaches being handled from Hattiesburg at that time?

A. Because of the Camp—bringing a vast number of people here and it required more than the regualr coaches on the train at the time to carry the people who presented themselves for transportation.

Q. Do you mean soldiers?

A. Not exclusively—both.

Q. Did you handle soldiers at that time in these coaches?

A. Yes, we handled both going and coming on all trains and coaches.

Q. At that time?

A. Yes.

Q. And those passengers were being transported largely from what points to Camp Shelby?

A. I can't state off-hand from what points, but we received a vast number from the I. C.

Q. Were those interstate passengers or intrastate passengers?

A. Some of them were interstate, while others were intrastate.

Q. I will ask you if you can state, if you know, that the occasion of those coaches being left here, being the regular coaches, was for the purpose of han-

dling the intrastate passengers, being the soldiers located at Camp Shelby, in bringing them in and carrying them back?

A. That is what we kept the cars here for. (R., p. 200.)

Q. And they were used for that purpose?

A. Yes." (R., p. 201.)

Counsel states that the passenger coaches when moving were used for soldiers and that soldiers came from Indiana, West Virginia, and Kentucky, and when moving out they were destined for the Atlantic Seaboard transportation to the battle front in France.

We submit that this statement is without foundation in fact. There is no evidence that these coaches came in the morning of the day of the accident loaded with soldiers or that they were to move out loaded with soldiers, or that they were being prepared for use to transport soldiers to another State or nation. To the contrary that statement of facts by the Supreme Court of Mississippi in every respect is fully justified and warranted by the record in this case. There is nothing in this case to show on what kind or character of tickets the soldiers or other passengers were carried. It is not shown that the soldiers paid for their tickets or that the Government paid for their tickets, or where the soldiers were destined to be delivered or received. The Record stops after showing that soldiers were carried, leaving the court to infer every other material fact.

The record is positive that these coaches when used were for the purpose of accomodating any and all persons who offered themselves as passengers on said road, whether civilian or soldiers.

We therefore submit on the facts in this case there was no showing that the passenger coach involved in this controversy or the servant of the railroad company while moving them were engaged in interstate commerce.

V,

Petitioner in Error when It Charges that the Pleadings of Appellee Invokes Federal Employers' Liability Act. The Pleadings were Amended and Consolidated so as to Maintain Action under Either the State or Federal Law.

Petitioner states in his brief that the declaration and the pleas having been constructed on the theory that the plaintiff was employed in interstate commerce, and the defendant so engaged, the trial proceeded on that thory without specific proof having been introduced on this point. This statement is incorrect on both propositions. It is true that on the third day of October, 1919, Mrs. Maud E. Green and her four children brought suit to recover for the death of Jesse Green, and it is true the petitioner filed a plea to this declaration setting out that the master and the deceased conductor and engineer were engaged in interstate commerce at the time of the difficulty, and it is true that appellant plead and answered to this declaration that deceased Green assumed the risk. While the case was in this attitude and after the respondent had filed replications to petitioner's plea, in which it was denied that the deceased Green or the engineer were engaged in interstate commerce, or that Green had assumed the risk, the case was continued by the court, and it is true that Mrs. Maud E. Green was appointed ad-

ministratrix of the estate of Jesse Green, deceased, and it is true that another suit was filed by her against appellant for the death of Jesse Green, but it is not true that this declaration was filed on the theory that they were engaged in interstate commerce. To the contrary, it was not stated in the above declaration nor was it stated in any count of the first declaration that the deceased Green or other employees were engaged in interstate commerce at the time of the accident. As soon as Mrs. Maud E. Green had been appointed administratrix a motion was filed asking leave of the court to amend the first declaration by substituting her as administratrix as the plaintiff in lieu of herself as next of kin, and as next friend of her minor children. This motion was sustained and the two suits were each in the name of the administratrix, and each being based on the same cause of action another motion was filed asking that the two suits be consolidated. This motion was also sustained without objection or exception. Now the purpose of this amendment and the purpose of the new suit was not as stated by appellant to charge that deceased Green or appellant were engaged in interstate commerce at the time. The amendment and consolidation were for the reason that under the State law the suit may be brought either by the next of kin or in the name of the legal representative, at the option of the parties suing. The Federal Employers' Liability Act provides that the suit must be brought in the name of the legal representative and if this cause had been prosecuted in the name of the next of kin the appellant would have had two opportunities to defeat the action, to wit:

(1) That the deceased was engaged in interstate commerce.

(2) That the deceased assumed the risk.

If the deceased was engaged in interstate commerce at the time this alone would be sufficient, as the suit was in the name of the next of kin, who would have had no title to the cause of action in such case, and this would be a good plea in bar to the cause of action brought in the name of the next of kin.

If petitioner could show that the deceased assumed the risk this would also be a sufficient plea and bar to the action. Now if the petitioner and the deceased were engaged in interstate commerce and if the suit had been brought in the name of the administrator, the simple fact that they were engaged in interstate commerce would not be a good defense in bar to the action. Therefore in order to avoid and to prevent the petitioner having the advantage of pleading that the deceased was engaged in interstate commerce as a bar to the action, the suit was changed from a suit in the name of the next of kin to a suit in the name of the administratrix. We repeat there is no allegation in either one of the three counts of the first declaration nor is there any allegation in the amended declaration that deceased Green or the engineer or the appellant were engaged in interstate commerce at the time of the accident.

VI.

Petitioner is in Error in Stating Case was Tried on Theory that Parties were Engaged in Interstate Commerce.

On this question the Mississippi Supreme Court in this case, 87 Southern, 652, says:

> "The plaintiff contended in the court below that the liability was governed by a State law and contends in this court that this is true."

The fact is respondent contended in the trial court that petitioner's liability was to be determined by the State law, and that the Employers' Liability Act would not control. The trial court, however, held that in the facts as developed at the trial that deceased and petitioner were engaged in interstate commerce at the time of the killing and respondent's case should be tried under the provisions of the Employers' Liability Act, and respondent was forced by this ruling of the court to continue the trial in accordance with the trial court's finding on this question.

To further show that the question of fact as to whether or not the deceased Green and the appellant were engaged in interstate commerce was treated by the trial court and by the Supreme Court of the State of Mississippi as an issue of fact in the case, appellant introduced witnesses on this question. We have heretofore quoted from the testimony of such witnesses and these witnesses were cross-examined, and on the facts as developed from these witnesses and not from the pleading as stated by counsel, the trial court held that the parties were engaged in interstate commerce. After the case had been tried, and while it was on appeal before the State Supreme Court, appellee continued to insist in that court that her cause of action should be tried by the State law and that the parties were not engaged in interstate commerce. Petitioner replied to this contention by citing the court to the facts in the case, never, at any time, insistent that this question was settled by the pleading, and finally on this question of pleading and on this issue of fact the State Supreme Court held, as heretofore quoted, not only that this issue of fact was properly met by the pleading, and that the respondent on the pleading had a right to insist

that her cause of action be tried under the State law, but the court went further and sustained her contention that the parties were not engaged in interstate commerce at the time of the killing.

We submit to the court that on all questions of pleading the ruling of the State Supreme Court will be final and that the State Supreme Court has held in this case that the pleadings properly presented the question as to whether or not the parties were engaged in interstate commerce, and in addition to that also held that the facts in the case demonstrated that the parties were not engaged in interstate commerce. It may be that this ruling of the State court on this question of fact might be reviewed in this court, and the ruling of the State court on the question of pleading, that is, as to whether or not the pleadings presented an issue of fact as to whether or not the parties were engaged in interstate commerce was purely a question of procedure in the State court, and the ruling of the State Supreme Court on that subject would be final.

We therefore submit petitioner is in error when he states in his brief that the pleading settled the question as to whether or not the parties were engaged in interstate commerce, and that it was not necessary for him to inrtoduce proof on that question in the trial court.

VII.

Petitioner Pleaded the Federal Act and Therefore the Burden of Proof was on Him to Show that the Employees were Engaged in Interstate Commerce.

The petitioner, in the trial court and in the Supreme Court of Mississippi, never suggested, argued or contended that the pleadings in the cause were such as to remove the necessity of any proof as to whether the deceased, Green, was engaged in interstate commerce. In the State court the petitioner requested the trial court to instruct the jury peremptorily that the employees were engaged in interstate commerce at the time this cause of action arose, and over the objection of appellee this instruction was granted, not on the ground that no proof was necessary, but on the ground that the testimony introduced was sufficient to show that they were so engaged at the time and place of the injury complained of.

We therefore insist that the burden of proof under the law was on the petitioner to show by the record that the parties were so engaged at the time. Counsel states in his brief, on page 2:

> "The declaration and the plea having been constructed on the theory that the plaintiff was employed in interstate commerce and the defendant so engaged the trial proceeded on that theory without specific proof having been introduced on this point."

We submit that this statement by counsel for petitioner confesses that the proof introduced on the question as to

whether or not the parties were engaged in interstate commerce at the time was insufficint.

We therefore submit to the court that on the record in this case petitioner is incorrect when he assumed that this question was settled by the pleading and he is also in error when he assumed that the burden of proof was not on him to maintain this allegation of fact.

We also submit that in any case the question as to whether or not the Employers' Liability Act is to control the cause of action must always be determined by the facts in the case and no agreement, stipulation, or pleading will ever settle or control this question, the court in every instance looking to the facts in the case to find if the parties were engaged in interstate commerce and allow the facts to settle under what law each cause of action must be tried.

VIII.

No Federal Question Involved in Award of Damages.

On the question of damages the verdict in this case was for $35,000. The petitioner having objected to the amount of the verdict on the ground that it was excessive, the State court in its opinion, after first calling attention to the difference between the State law and Employers' Liability Act on the elements of damage which could be considered and on a comparison of the elements of damage which might be considered under each act, held that a much larger verdict might be sustained under the State Statute than could be sustained under the Federal Statute, and that since the State court had adopted the Federal Statute as standard, the State

court would consider the appellant's objection on the ground as to whether or not the verdict was excessive in accordance with this rule and held that the verdict was excessive, measured by this rule, and reduced the verdict to an amount much less than would have been sustained under the State Statute. Because of this fact the court's opinion then provided if appellee did not wish to accept this reduction in so far as the damages were concerned, same would be reversed and a jury impaneled to award the damages in accordance with the State Statute. In no place in this opinion can the appellant cite the court where the State court sustained a theory propounded by petitioner in this court that deceased, Green, was engaged in interstate commerce at the time of his death.

ARGUMENT.

VIII.

Petitioner in His Brief Assumes and States Facts Not Supported by the Record. Pleadings of Appellee Amended and Consolidated in Trial Court in Order to Maintain Cause Either under the State or Federal Law.

The respondent would respectfully show that the appellant continues in his brief to reassert the errors of fact contained in the original petition, and on the basis of such errors of fact proceeds to argue questions of law that appellee contends do not arise in this case. It is asserted as a fact in his brief that the declaration was filed under the Federal Employers' Liability Act, and it is asserted that the declaration

alleged that the deceased, Green, was engaged in interstate commerce, whereas, as a matter of fact, no such allegations are contained in the declaration. To the contrary, it was charged in one of appellant's pleas only, that deceased, Green, was engaged in interstate commerce, and this fact was denied by the appellee's replication, and this denial was held to be sufficient by the Supreme Court of the State.

The court, in Hines *vs.* Green, 87 So., 649, says in part as follows:

> "The original declaration was filed in three counts, alleging that the engineer was an unsafe and dangerous man to be employed and with whom to work, on account of his quarrelsome, dangerous, and vicious habits and character, which were known to, or by the exercise of reasonable diligence ought to have been known to, the appellant.
>
> "The appellant defended under the general issue, and filed certain special pleas. Among other pleas, it pleaded that the deceased and the engineer were at the time of the killing engaged in interstate commerce for the appellant, and that the liability of the appellant was covered by the Federal Employers' Liability Act (U. S. Comp St., secs. 8657-8665), and that under this act there was no liability upon the appellant for the death of the appellee's intestate. When this plea was filed by the defendant a new suit was filed by the appellee as administratrix under the Federal Employers' Liability Act, in which the acts alleged in the other suit were declared on, and it was alleged that at the time of the injury the deceased and the engineer were engaged in the business of the master and in furtherance of the master's business, bringing the case under the Federal Employers' Liability Act, and then, upon motion of the appellee,

the two suits were consolidated by the circuit court without objection, and the case proceeded to judgment, resulting in a verdict and judgment of $35,000 in favor of the appellee as administratrix.

* * * "The plaintiff contended in the court below that the liability was governed by the State law, and contends in this court that this is true."

We therefore submit that, in so far as the question of pleading is concerned, there are three answers to petitioner's position. The first is that petitioner's contention is not supported by the facts in the case, and as to this, appellee respectfully submits that the declaration did not allege, as charged in the petition, that deceased, Green, was engaged in interstate commerce, nor did the appellee in filing and prosecuting her action proceed on this theory. The record also shows that only one plea was filed by the petitioner in which it is charged that deceased, Green, was engaged in interstate commerce at the time of his death, the other two pleas being the general issue and a special plea undertaking to set up assumption of risk. The record shows that petitioner filed replications to each special plea and took issue with same, and the issue was properly joined on these questions.

Respondent also submits that it was on this theory the petitioner introduced proof in the trial court, and it was on this theory that respondent objected to the trial court's ruling that the testimony introduced was sufficient to show that deceased, Green, was engaged in interstate commerce, and continued to press this objection in the Supreme Court, and in discussing that objection in the Supreme Court of Mississippi argued only questions of fact, and it was on this theory

that the appellant in replying to respondent's objection and argument in that court also undertook to justify such ruling by also referring to the facts, never at any time making the argument in that court as he seeks to do in this, that because of the condition of the pleading no proof was necessary on the question as to whether or not the deceased, Green, was engaged in interstate commerce. Petitioner undertook to prove it in order to support his plea, and he failed to do so. Therefore, as contended by respondent in all the courts, the State law should prevail. The second answer to petitioner's position in this regard is that the Supreme Court of the State of Mississippi in its opinion in this case on the record before it decided that there was an issue on this question properly presented by the pleadings, and appellant in filing a suggestion of error in that court at no time ever suggested to the Supreme Court of the State of Mississippi that it was in error as to that part of its decision. The third answer to petitioner's position is that the decision of the Supreme Court of the State on this question of pleading is non-Federal and final, and this court is bound by the ruling of the State court in regard to such pleading.

In National Foundry Works *v.* Oconto City Water Supply Co., 46 L. Ed., 157, the court holds:

> "That questions of pleading when considered solely as questions of State practice are outside the scope of review on writ of error to a State court."
>
> Grand Rapids & I. R. Co. *v.* Butler, 159 U. S., 87; 40 Law Ed., 85.
>
> Johnson *v.* Drew, 171 U. S., 93; 43 L. Ed., 88.

Also, in the case of Allen *v.* Alleghany Co., 196 U. S., 458; 49 L. Ed., 551, it is again held by this court that the

decision of a State Supreme Court on questions of pleading is non-Federal and final.

Since the Supreme Court of the State of Mississippi has decided that the issue was properly joined, in so far as the question of whether or not the deceased, Green, was engaged in interstate commerce at the time of his death in accordance with the rules of pleading and practice in that State, appellee respectfully submits that this rule of law completely answers his petition on the question as to whether it was necessary for proof to be introduced to show that deceased, Green, was engaged in interstate commerce at the time of his death.

The next question presented is based on the contention that the testimony in the case shows that deceased, Green, was engaged in interstate commerce at the time of his death. On this proposition appellee respectfully submits that there are two separate, distinct, and complete answers; the first answer is that in any view of the case this is a question of fact and not a question of law, and the decision of the Supreme Court of the State on questions of fact is non-Federal and final. The second answer is that the finding of the Supreme Court of the State on this question is supported by the uncontradicted testimony in the record, and for this reason the writ should be denied without regard to the question as to whether it had final jurisdiction on questions of fact.

On the first proposition, we call the court's attention to the case of Allen *v.* Southern R. R. Co., 173 U. S., 479; 43 L. Ed., 775, in which this court says:

> "In inquiring whether jurisdiction to review a decree of a State court may be declined because such

> decree may be sustainable on an independent no-federal ground, the Supreme Court of the United States considered only the final action of the highest court of the State in disposing of the controversy, and is not concerned with the conclusion of the trial court or of a department of such highest court."

The record in this case shows that the Supreme Court of Mississippi decided what the facts were with regard to whether the deceased, Green, was or was not engaged in interstate commerce at the time of his death, and in making this statement we do not mean that the Supreme Court held as a conclusion that the deceased, Green, was not engaged in interstate commerce at the time, but we mean to say that the facts were found by the court and are stated by the court in its opinion in the record, and from these facts the court concluded that the deceased, Green, was not engaged in interstate commerce at the time of his death, and the point we make is not that this court is bound by the conclusion reached by the Supreme Court of the State, that the deceased was not engaged in interstate commerce at the time of his death, but that this court is bound on the finding of the Supreme Court of the State of Mississippi as to what the facts were in this record.

For authority on this proposition we respectfully call the court's attention to the case of Dower *v.* Richard, 151 U. S., 658; 38 L. Ed., 305, in which it is said:

> "The reasons against the exercise by the U. S. Supreme Court of its jurisdiction to review a judgment of a State court which rests on an independent ground of law, not involving a federal question, are as strong if not stronger when the decision of the State court proceeds upon matter of fact only."

In the case of Gardiner *v.* Bonesteel, 45 L. Ed., 574, the court held:

> "The Supreme Court in the review of action from the State court will follow the findings of facts of this court."

We understand the rule to be that this court accepts as binding the findings upon issues of fact duly made in the court of last resort in the State.

Waters-Pierce Oil Company *v.* Texas, 212 U. S., 86.
Rankin *v.* Emigh, 218 U. S., 27.
Kerfoot *v.* Bank, 218 U. S., 281.

In Christman *v.* Miller, 197 U. S., 313, it is said:

> "Findings of fact are conclusive on the Supreme Court of the United States in cases coming up from the State court."

In Chapman & D. Land Co. *v.* Bigelow, 206 U. S., 41; 51 L. Ed., 953, the court held:

> "The decision of State court upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States."

And to the same effect may be found the following cases:

Keokuk & H. Bridge Co. v. Ill., 175 U. S., 626; 42 L. Ed., 299.
Jenkins v. Neff, 186 U. S., 230; 46 L. Ed., 1140.
Western Union Tel. Co. v. Call Publishing Co., 181 U. S., 92; 45 L. Ed., 765.
Bartlett v. Lockwood, 160 U. S., 357; 40 L. Ed., 445.

"Alleged errors of a State court, which involves questions either of fact or of State law and not Federal law, are not reviewable in the United States Supreme Court on writ of error."

Quimby v. Boyd, 128 U. S., 488; 32 L. Ed., 502.

"In actions at law this court has no jurisdiction to reverse the decision of the highest court of a State upon a question of fact, although a Federal question might arise, if the question of fact were decided in a particular way."

Israel v. Arthur, 152 U. S., 355; 38 L. Ed., 476.

Many other cases could be cited along the same line. We submit the above should be sufficient to sustain the proposition that the finding of the Supreme Court of the State as to the facts in this case is final.

On the discussion of the second proposition, it is necessary for the Court to compare the finding of the State Supreme Court as to the facts with the record in this case upon which such finding was made.

The testimony in the record is very short and is copied in our statement of fact, to which we respectfully refer the court.

We respectfully submit that this testimony shows that the deceased, Green, and the other employees, were not engaged in interstate commerce at the time when and the place where Green was killed. None of the cars were loaded with any kind of freight. The passenger cars were used and were to be used in trains which ran from the city of Hattiesburg to Camp Shelby or to Gulfport and Jackson, points in Mississippi. This engine and these coaches were in no sense being

used as interstate conveyances at the time and place of the tragedy. Even while they were in active use on the main line of defendant, they crossed no State line, and the fact, if it is a fact, that passengers occasionally rode therein on a journey to other States, did not make them interstate conveyances in the yards of petitioner while they were empty and being cleaned.

Volume 2, Roberts Federal Liability on Carriers, Sec. 503, states the rule to be:

> "The ordinary and usual test in determining whether switching crews employed in railroad yards are engaged in interstate commerce or whether at the very moment of the accident they are assisting in moving interstate traffic, that is, cars either loaded or empty originating in one State and destined to a place in another State, territory or foreign country."
>
> See *Erie R. C. v. Welsh,* 242 U. S., 303; 61 L. Ed., 319.
>
> *Seaboard Air Line Ry. v. Koennecke,* 239 U. S., 352; 60 L. Ed., 324.
>
> *Penn. Ry. Co. v. Donat,* 239 U. S., 50; 60 L. Ed., 139.
>
> *I. C. R. R. Co. v. Benhams,* 233 U. S., 473; 58 L. Ed., 1051.
>
> *A. G. S. R. R. Co. v. Skotzy,* 7 So., 335.

IX.

The Petitioner Pleaded Federal Employers' Liability Act. Burden was on It to Prove Act Applied. No Such Proof was Made, Therefore Act Does Not Apply.

> "When the defendant seeks to prevent recovery under the State law by showing the Federal Act con-

trols, the defendant has the burden of proof, and that the employee was engaged in interstate commerce at the time of the injury."

Roberts' Injuries to Interstate Employees, Vol. 1, Section 466, page 808.

In *Chicago, B. & Q. R. R. Co. v. Harrington*, 241 U. S., 177, the court held:

"Unless the injured employee of an interstate and intrastate carrier is engaged in interstate commerce at the time of the injury the Federal Employers' Liability Act does not apply, and it is immaterial whether such employee had previously been, or in the immediate future was to be, engaged therein."

In *Railroad Company v. Yorknis*, 238 U. S., 439, the court held:

"An employee of a carrier engaged in removing coal from storage tracks to coal chutes, is not engaged in interstate commerce even though the coal had been previously brought from another State and was to be used by locomotives in interstate hauls."

In *Shauks v. R. R. Co.*, 239 U. S., 556, the court held:

"The Federal Employers' Liability Act refers to interstate commerce in a practical sense, and the test is whether the employee at the time of the injury was engaged in interstate transportation or in work so clearly related thereto as to be practically a part thereof."

In *Minn., St. Paul R. Co. v. Winters*, 242 U. S., 353, the court held:

"When a State court applies the Federal Employers' Liability Act to an action governed by the State law, the error is not ground for reversing the judgment upon the complaint of a party who did not oppose but invoked and relied upon the application of the Federal statute."

"In such circumstances, however, this court will not pass upon question concerning negligence and assumption of risk if the facts touching the plaintiff's employment are stated and agreed and failed to make a case within the Federal Act."

"The injury occurred while plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce or to it at the time. Held not a case within the Federal Employers' Liability Act."

In the opinion delivered in this case the Mississippi Supreme Court, 87 So., 648, says:

"The United States Supreme Court has laid down the test for determining whether the Federal Employers' Liability Act was applicable in the following language:

" 'Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it.' *Southern Pac. Co. v. Industrial Accident Commission*, 251 U. S., 259, 263; 40 Sup. Ct., 130, 131 (64 L. Ed., 258); *Feder-*

sen v. Delaware, L. & W. R. Co., 229 U. S., 146, 151; 33 Sup. Ct., 648; 57 L. Ed., 1125; Ann. Cas., 1914C, 153, 3 N. C. C. A., 779; *Shanks v. Delaware, L. and W. R. Co.*, 239 U. S., 556; 36 Sup. Ct., 188; 60 L. Ed., 436, 438; L. R. A., 1916C, 797; *New York C. R. Co. v. Porter*, 249 U. S., 168; 39 Sup. Ct., 188; 63 L. Ed., 536; *Kinzell v. Chicago, M. & St. P. R. Co.*, 250 U. S., 130, 133; 39 Sup. Ct., 412; 63 L. Ed., 893, 896. In *Industrial Accident Commission v. Payne*, No. 224 Supreme Court Reporter, 489.

> "Measured by this test, the facts do not bring the case within the Federal Employers' Liability Act, for the reason that none of the things being operated and moved at the time of the injury were being then used in interstate commerce, nor were they intended to be so used immediately upon being placed in condition for use, nor was there any fixed time or purpose for their early use so as to make them so intimately connected with interstate commerce as to be practically a part thereof."

We respectfully submit that this announcement of the law is applicable to the facts as shown by the record in this case is correct.

X.

No Error in Record of the Trial Court Whether Cause of Action is Controlled by State or Federal Court.

We respectfully submit that this case viewed from any standpoint, whether governed by the State or the Federal law was properly tried in the court below, the trial court. As a matter of fact the appellant sought and obtained in the trial court a more favorable announcement of the law than

it was entitled to receive. On this point the Mississippi Supreme Court, 87 Southern, 652, says:

> "There are a number of assignments of error as to instructions complained of by the appellant, but the errors, if any, are favorable to the appellant, and require more facts to be found to render liability against the appellant than the law required."

In conclusion we wish to thank the court for having granted permission for us to file this reply brief. Petitioner having failed to file his brief within the time provided by the rules of this court has made it impossible for us to prepare and present our side of this case as carefully as we should like to have done, but we feel confident that the justice of our cause will in the end be our best organ.

We respectfully request the court to affirm the judgment rendered by the Supreme Court of the State of Mississippi and to allow interest and damages as provided for by law and the rules of this court in such cases.

E. L. DENT,
J. W. CASSEDY,
Attorneys for Respondent.

I hereby certify that I have this day personally handed to Hon. T. J. Willis, Attorney of Receiver for respondent, a true and correct copy of the above and foregoing statement of facts and brief.

This November 25, 1922.

E. L. DENT,
Attorney for Respondent.

DAVIS, DIRECTOR GENERAL OF RAILROADS, AND AGENT UNDER SECTION 206 OF TRANSPORTATION ACT OF 1920, *v.* GREEN, ADMINISTRATRIX OF GREEN.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 132. Argued November 28, 1922.—Decided December 4, 1922.

1. A railroad company is not liable under the Federal Employers' Liability Act for an injury inflicted by the wanton, wilful act of an employee, out of the course of his employment. P. 351.
2. Where the case was tried upon the warranted assumption that the parties were engaged in interstate commerce at the time of the injury, the defendant cannot be deprived on review of rights under the federal act upon the ground that such employment was not adequately proved. P. 352.

125 Miss. 476, reversed.

CERTIORARI to a judgment of the Supreme Court of Mississippi, affirming, with a reduction, a judgment recovered by the present respondent in a consolidated action for the death of her husband.

Mr. T. J. Wills for petitioner.

Mr. J. W. Cassedy, with whom *Mr. E. L. Dent* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action made up of the consolidation of two suits, both brought to make the plaintiff in error liable for what is alleged to have been the wilful and wanton killing of Jesse Green, a conductor on the line of the Gulf & Ship Island Railroad Company, by one McLendon, an engineer. The first suit, although alleging that the railroad was a common carrier both intra and interstate, may be taken to have been brought under the state law. It was brought by the widow of Green on her own behalf and his children by her as next friend. To this the defendant pleaded in bar among other things that the plaintiffs ought not to have their action because at the time and place the parties were engaged in interstate commerce in this that the defendant and the employees named were engaged in transporting articles of commerce from and to foreign States. The second suit was brought three months later by the widow as administratrix and was intended to state a cause of action under either the law of the State or the act of Congress as the facts should turn out. To this also there was a plea in the words that we have quoted in abridged form. The plaintiff replied denying that she ought not to have her action because at the time and place of the said injury the defendant and the deceased were engaged in interstate commerce in this that, &c., following the words of the plea. This was a plain case of what in the old pleading was called a negative pregnant; it admitted the fact and only denied the conclusion. Very probably it was intended to deny the fact, as this mode of traversing a paragraph as a whole is very

common in the present careless ways, but it did not deny it in legal effect. Directly after the second suit was brought, the principal plaintiff was allowed to change the first to a suit by herself as administratrix and the two suits were consolidated on her motion. As the replication that we have mentioned seems to have been filed after the consolidation, perhaps it was regarded as going to the plea in both suits. Otherwise that in the first suit does not appear to have been put in issue. At the trial the judge ruled that the parties were engaged in interstate commerce, without objection so far as the record shows, but refused, subject to exception, to direct a verdict for the defendant. The plaintiff had a verdict and judgment for $35,000, and the case then was taken to the Supreme Court.

The Supreme Court sustained the judgment, although it held that the case was governed by state law. It held that on the general principle of liability the act of Congress and the law of the State agreed. It held, however, that there were important differences between the two laws with regard to the measure of damages and otherwise, and that as the case was tried under the act of Congress, and as on the evidence the highest amount that could have been recovered under the federal act was $16,000, the plaintiff must remit all above that amount if she would retain her judgment, although under the state law she could have recovered more.

The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under

the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies.

As we understand the opinion of the Supreme Court of Mississippi, it based its decision in part upon the assumption that liability for the engineer's act was imposed upon the defendant by both laws, and this assumption would be a sufficient ground for reversing the judgment. But we should come to the same conclusion even if our understanding were shown to be wrong. As the record stands, it appears to us that the case was tried upon the warranted supposition that there was no serious controversy as to the parties having been engaged in interstate commerce, and for that reason the defendant paid but slight attention to proving the fact. It seems at least not improbable that the parties were so engaged. In such circumstances the defendant is not to be deprived of its rights under the law of the United States by a decision that the fact now questioned was not adequately proved. On such matters we must judge for ourselves. If there is a new trial, probably the plaintiff will be allowed to dispute the character of the employment, if she is so advised. See *Bowen* v. *Illinois Central R. R. Co.*, 136 Fed. 306.

Judgment reversed.